TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 98.

ROCK ISLAND FLOW COMPANY, APPELLANT,

vs.

W. J. BEARDON, TRUSTEE IN BANKRUPTCY OF [illegible] BROWN, BANKRUPT.

APPEAL FROM THE [illegible] COURT OF [illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 98.

ROCK ISLAND PLOW COMPANY, APPELLANT,

vs.

W. J. REARDON, TRUSTEE IN BANKRUPTCY OF FRANK BROWN, BANKRUPT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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a In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1907.

No. 1501.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Appellant,
vs.
ROCK ISLAND PLOW COMPANY, Appellee.

Mr. Ira J. Covey, Counsel for Appellant.
Mr. Walter H. Kirk, Mr. B. D. Connelly, Mr. H. C. Connelly, Counsel for Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

1 *Placita.*

Pleas in the District Court of the United States of America, within and for the Northern Division of the Southern District of Illinois, held in the City of Peoria, in said Division and District, before the Honorable J. Otis Humphrey, Judge of said Court, on Monday, the fourth day of May, in the year of our Lord one thousand nine hundred and eight and of our Independence the one hundred and thirty-second year.

2 *Bill of Complaint. Filed Jan.* 24, 1908.

In Chancery.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
ROCK ISLAND PLOW COMPANY (a Corporation).

Be it remembered that heretofore to-wit, on the twenty-fourth day of January in the year of our Lord one thousand nine hundred and eight, came W. J. Reardon, Trustee in Bankruptcy of Frank Brown, bankrupt, by Covey & Covey, his solicitors had filed in the office of the Clerk of the District Court of the United States for the Southern District of Illinois, a certain Bill of Complaint, which said Bill of Complaint is as follows, to-wit:

In the District Court of the United States, Southern District of Illinois, Northern Division.

In Chancery.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
THE ROCK ISLAND PLOW COMPANY, a Corporation.

To the Honorable J. Otis Humphrey, Judge of said District Court:

Your orator W. J. Reardon, trustee in bankruptcy of Frank Brown, bankrupt respectfully represents unto your Honor that on

to-wit the 27th day of November, A. D. 1907 the said Frank Brown of Pekin, Tazewell County, Illinois filed in this court a voluntary petition in bankruptcy and that he was thereafter on to-wit the said 27th day of November, A. D. 1907 duly and regularly adjudged bankrupt by said court and that thereafter your orator was regularly elected trustee in bankruptcy of said bankrupt estate and that your orator has qualified and is now acting as such trustee.

Your orator further represents that on to-wit the 25th day of November, A. D. 1907 the said bankrupt, being indebted to
3 the Rock Island Plow Company, an Illinois corporation, having its principal place of business in the City of Rock Island, County of Rock Island and State of Illinois which is hereinafter named as the defendant upon a previously existing indebtedness for merchandise sold and delivered by the said Rock Island Plow Company to the said Frank Brown amounting to the sum of to-wit Four Hundred and six ($406.00) Dollars, did transfer and deliver to the said Rock Island Plow Company goods, wares and merchandise consisting of gang plows, cultivators, harrows, pulverisers and other farm implements of the property of said Frank Brown, bankrupt, of the value of to-wit Five Hundred ($500.00) Dollars in full payment and discharge of said indebtedness so owing by the said bankrupt to the said Rock Island Plow Company.

Your orator further represents that at the time the said bankrupt transferred and delivered said merchandise to the said Rock Island Plow Company in payment of said indebtedness owing by the said bankrupt to the said Rock Island Plow Company, and at all times since then up to the time of the filing of said voluntary petition in bankruptcy the said Frank Brown was insolvent of which fact the said Rock Island Plow Company at the time of the receipt by it of said merchandise in payment of said debt had notice and that the said Rock Island Plow Company then had reasonable cause to believe that the said bankrupt was insolvent and unable to pay his debts in full; that the said transfer and delivery of said merchandise so made by the said bankrupt to the said Rock Island Plow Company was made within four months next preceding the date of the filing of said petition in bankruptcy by the said Brown; that the said transfer of merchandise by the said bankrupt under the circumstances hereinbefore alleged was in violation of the rights and interests of other creditors of said bankrupt and in violation of the provisions of the Acts of Congress relating to bankruptcy and amounted to an unlawful preference of said Rock Island Plow Company over the other creditors of said bankrupt of the same class as the said Rock Island Plow Company. "a."

Forasmuch therefore as your orator is without remedy in the premises, except in a court of equity, your orator prays: That the said Rock Island Plow Company, a corporation, which is made
4 party defendant to this, your orator's bill of complaint, may be required to answer the same, but not under oath, the answer under oath being hereby expressly waived; that an account may be had under the direction of this Honorable court and the amount of the property transferred by the said bankrupt to the

said Rock Island Plow Company in payment of said previously existing debt and the value thereof, within four months prior to the filing of said voluntary petition in bankruptcy may be ascertained and that the said defendant may be decreed by the court to return to your orator all property so received by the said Rock Island Plow Company from the said bankrupt or the value thereof and that the said defendant may be decreed to surrender to your orator all preferences received by it from the said bankrupt within four months previous to the filing of said petition in bankruptcy; that the said defendant may be required to set forth and discover a full and complete description, together with the value thereof, of all property received by it from the said Frank Brown within four months previous to the date of the filing of said voluntary petition in bankruptcy and under what circumstances it received the same; and that your orator may have such other and further relief in the premises as the nature of the case may require and to your Honor may seem meet.

May it please your Honor to grant to your orator the writ of subpœna directed to the said Rock Island Plow Company commanding it on a day certain therein to be named to be and appear in this Honorable court then and there to answer the premises and to stand to, perform and abide by such other and further orders, directions and decrees as may be made against it, and your orator as in duty bound will ever pray, etc.

W. J. REARDON,
Trustee in Bankruptcy of Frank Brown.

COVEY & COVEY,
Solicitors for Complainant.

STATE OF ILLINOIS,
Tazewell County, ss:

W. J. Reardon, trustee being first duly sworn says that he has read the above and foregoing bill of complaint and knows the contents thereof and that the same is true according to the best of his knowledge, information and belief.

W. J. REARDON.

Subscribed and sworn to before me this 23rd day of January, A. D. 1908.

[NOTARIAL SEAL.] CONN LUTHER CONDER,
Notary Public.

Endorsed: #148. In District Court, Southern District of Illinois, Northern Division; W. J. Reardon, Trustee, etc.—vs.—Rock Island Plow Co.—Bill to set aside preference—Filed Jan. 24, 1908 at 4.30 o'clock P. M., R. C. Brown, Clerk.

And thereupon there issued out of the office of the Clerk of said Court a certain Chancery Subpœna directed to said Rock Island Plow Company, which said Chancery Subpœna together with the Marshal's return thereon, was and is as follows, to-wit:

Chancery Subpœna.

UNITED STATES OF AMERICA,
Southern District of Illinois, Northern Division, ss:

The United States of America to The Rock Island Plow Company, a corporation:

We Command You and Every of You, That you appear before our Judge of our District Court of the United States of America, for the Southern District of Illinois, at Peoria, in the Northern Division of said District, on the first Monday in the Month of March next, to answer the bill of complaint of W. J. Reardon, Trustee in Bankruptcy of Frank Brown, Bankrupt, this day filed in the Clerk's office of said Court, in said City of Peoria, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

6 To the Marshal of the Southern District of Illinois to Execute.

Witness the Hon. J. Otis Humphrey, Judge of said Court, at Peoria aforesaid, this 24th day of January in the year of our Lord one thousand nine hundred and eight, and of our Independence the 132nd year.

[L. S.]

R. C. BROWN, *Clerk*,
By J. T. B. JONES,
Chief Deputy.

Memorandum.

The above defendant is notified that unless it shall enter its appearance in the Clerk's office of said Court, at Peoria aforesaid, on or before the day to which the above Writ is returnable, the complainant's bill will be taken against it as confessed, and a decree entered accordingly.

R. C. BROWN, *Clerk*,
By J. T. B. JONES,
Chief Deputy.

(*Marshal's Return.*)

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I have served this writ within my district in the following manner to-wit:

Upon the Rock Island Plow Company, a corporation therein named by personally delivering a true copy of the same to Phil Mitchill, President of the Rock Island Plow Company, at Rock Island, Rock Island County, Illinois, this 27th day of January, A. D. 1908.

L. A. TOWNSEND,
U. S. Marshal,
By S. O. TRIPP, *Deputy.*

Marshal's Fees.

92 miles	5.52
1 Service	2.00
	$7.52

7 Endorsed: Peoria's No. 585—Marshal's No. 1364.—General No. 148—District Court of the United States, Southern District of Illinois, Northern Division—W. J. Reardon, Trustee in Bkcy. of Frank Brown, Bankrupt—vs.—The Rock Island Plow Company, a corporation—Chancery Subpœna—Returnable to rule day, first Monday in March A. D. 1908. R. C. Brown, Clerk—Filed Jan. 28 1908 R. C. Brown, Clerk—Covey & Covey, Peoria, Ill. Complainant's Solicitor-.

And afterwards to-wit on the 2nd day of March, A. D. 1908, there was filed in the office of the Clerk of this court, the limited appearance of the Defendant; which said appearance is as follows:

Limited Appearance of Defendant.

In Chancery.

W. J. Reardon, Trustee in Bankruptcy of Frank Brown, Bankrupt.
vs.
Rock Island Plow Company.

Limited Appearance.

Now comes the defendant, Rock Island Plow Company, by Walter H. Kirk and Connelly & Connelly, its solicitors, and enters its appearance herein especially and not generally; this said appearance being hereby expressly restricted and limited for the purpose of filing and presenting herein a plea to the jurisdiction of the said Court in this proceeding.

Dated; Peoria March 2nd, 1908.

ROCK ISLAND PLOW COMPANY,
By WALTER H. KIRK,
CONNELLY & CONNELLY.

Endorsed: No. 148—W. J. Reardon, Trustee in Bankruptcy of Frank Brown, Bankrupt—vs.—Rock Island Plow Company (a corporation)—Defendant's Limited Appearance—Filed Mar. 2—1908, R. C. Brown, Clerk.

And afterwards to-wit, on the twenty seventh day of March in the year of our Lord one thousand nine hundred and eight came Walter H. Kirk and Connelly & Connelly and filed in the office of the Clerk of said court the Plea of the Defendant to the Original Bill of Complaint herein, which said Plea is as follows to-wit;

8 Plea, Filed March 27, 1908.

In the District Court of the United States, Southern District of Illinois, Northern Division at Peoria.

In Bankruptcy.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
THE ROCK ISLAND PLOW COMPANY (a Corporation).

The Plea of Rock Island Plow Company, a Corporation, Defendant, to the Bill of Complaint of W. J. Reardon, Trustee in Bankruptcy of Frank Brown, Bankrupt, Complainant.

This defendant, by protestation, not confessing or acknowledging all or any part of the matters and things in the complainant's said bill mentioned, to be true, in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereunto, and for plea says:

That this defendant has not consented to this suit being brought against it in this court nor has this defendant submitted any interest it may have in this cause to be determined in or by this court, and that this court is without jurisdiction in the premises and that this court cannot now lawfully proceed herein to try, fix or determine the rights and interests of this defendant in and to the subject matter of this proceeding:

That long prior to the date of the adjudication in bankruptcy herein of the said Frank Brown, bankrupt, which said adjudication is alleged in and by complainant's bill of complaint herein
9 to have been had on the twenty-seventh day of November, 1907, the said Frank Brown, bankrupt, obtained all the "goods, wares and merchandise, consisting of gang-plows, cultivators, harrows, pulverisers and other farm implements" which are now involved in this proceeding of and from the defendant under and by virtue of the terms and conditions of certain written contracts signed by the said Frank Brown, bankrupt, to-wit: under and by virtue of one certain written contract signed by said bankrupt in the name of "Brown Bros. *by* Per F. B." at Pekin, Illinois on the 15th day of December 1905; to-wit under and by virtue of another such written contract signed also by the said bankrupt in the name of "F. & S. Brown, by Frank Brown" at Pekin, Illinois on the 7th day of March 1906; and, to-wit, under and by virtue of another such written contract also signed by the said bankrupt in the name of "Brown Bros. Per F. B." at Glasford, Ill. on the 7th day of March 1906; true and correct copies of all which contracts are hereto attached, hereby referred to and made parts hereof and marked respectively Exhibits "A" " B" and "C."

That none of the goods, wares and merchandise now in question or involved in this proceeding were at any time in the custody, possession or control of the said Frank Brown, bankrupt, except

under and by virtue of some one or all of the aforesaid written contracts, and that in and by each and every one of the said written contracts, it was among other provisions therein contained, expressly provided and conditioned as follows, namely:

"It is agreed that the delivery of all goods sold, and the time "of payment granted to purchaser by terms of this contract, are in "reliance upon the credit standing and prospects of business of "purchaser as now engaged, communicated direct or through usual "commercial channels, and that if the status of the purchaser be "not as communicated, or if it be changed hereafter before full pay- "ment by mortgage, loss by fire, sale out of usual course of trade, "dissolution, assignment, bankruptcy, attachment or the like then "any and all of such indebtedness shall be at our election without "notice, immediately due, or we may treat the same, whether in "notes or on account as if the original purchases had been con- "tracted for cash on delivery.

"It is agreed that the right to the possession of all goods ordered "or described generally or specifically in this contract, or "which may be ordered and shipped to purchaser hereafter "during life of this contract as herein provided, and the "proceeds (in case of sale of same) shall remain in and inure to "us, with the effect that we may hold or retake and subject same "as security (in the manner described by law for the subjection of "chattels and foreclosure of chattel liens of like nature) to the in- "debtedness hereby contracted until full payment shall have been "made by purchaser to our acceptance; and to this end the moneys "and notes received on such sales shall be kept separate and apart "from other moneys, papers and transactions, but nothing in this "shall release purchaser from making payment as stipulated in this "contract."

That until paid for by the said Frank Brown, bankrupt, pursuant to the said written contracts, all of the said goods, wares and merchandise was and remained at all times the property of and belonging to the said defendant; and that on the 25th day of November 1907 the said Frank Brown, bankrupt, had not paid to the defendant the purchase price according to the said written contracts of and for the said goods, wares and merchandise involved in and forming the subject matter of this proceeding, and that the defendant then and there lawfully retook and repossessed itself of the same;

That the said Frank Brown, bankrupt, did not then and there on to-wit, the 25th day of November 1907 transfer to this defendant any goods, wares and merchandise which then and there were the property of and belonged to the said Frank Brown, bankrupt, but that the said Frank Brown, bankrupt, did then and there pursuant to the said written contracts under which the said goods, wares and merchandise were then and there held by him, deliver over to the said defendant the actual possession of the said goods, wares and merchandise and that the same then and there belonged in no part or parcel to the said bankrupt, but were then and there the exclusive property and effects of and belonging to the defendant, under and by virtue of the aforesaid written contract;

That the title to the said goods, wares and merchandise, was

never at any time vested in the said Frank Brown, bankrupt, but that the same always was and remained in the defendant, and that the same formed no part or parcel of the bankrupt estate or assets of the said Frank Brown, bankrupt;

11 That the said defendant on the said 25th day of November 1907 was not then and there a creditor of the said Frank Brown, bankrupt, and that in then and there taking possession of its property out of the hands of the said Frank Brown, bankrupt, the defendant was not then and there a creditor of the said bankrupt within the meaning of the provisions of the Acts of Congress relating to Bankruptcy; and that the same did not then and there amount to an unlawful preference of the said Rock Island Plow Company over the other creditors of the said Frank Brown, bankrupt;

That this court is in this case without jurisdiction except to ascertain the facts involving the merits of this plea in abatement, and is without jurisdiction herein except to find that it can go no further in this proceeding, except to dismiss the said bill in chancery filed herein;

All which matters and things this defendant affirms to be true and pleads the same to the whole of the said bill and demands the judgment of this Honorable Court whether this defendant ought to be compelled to make any answer to the said bill of complaint and prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

R*FCN* ISLAND PLOW COMPANY,
By WALTER H. KIRK,
CONNELLY & CONNELLY,
Its Solicitors.

WALTER H. KIRK,
CONNELLY & CONNELLY,
Solicitors for Defendant.

12 EXHIBIT "A."

Dealer's Copy.

Original. O2-5M-12-05.

Territory Assigned, Pekin and Glasford.

Always Read What You Sign and There Will Be No Misunderstanding Afterwards.

Contract for Agency for Goods Ordered Herein of Rock Island Plow Co., Rock Island, Ill., for the Season Ending 9/1 1906.

Order.

Dated at PEKIN, ILL., 12/15, 1905.

Rock Island Plow Company, Rock Island, Ill., Please ship on or about the — day of ——, 190– or as soon thereafter as possible, to

Brown Bros. Station Pekin Ill. Postoffice Pekin State Ill. via ——
(Name of Dealer.)
R. R.
Peoria Freights on this order.
Pekin or Glasford less switch chg
Freights on subsequent orders.
the goods below specified.

You may ship earlier, if you choose, provided the time of payment is not thereby changed. This order is given at the discounts named below from current price lists of the Rock Island Plow Co., and net prices set opposite each article described below, due and payable and subject to Cash Discount in accordance with the dates specified opposite each class of goods as hereinafter described under "Prices and Terms." Payments to be made in New York or Chicago exchange, or currency by express, charges prepaid. (Remittances by check at customer's risk. Failure to realize from any cause will be at customer's loss.) Subsequent orders during the season are subject to all the conditions of this contract and to changes in prices and discounts without notice. Payable at —— Bank. The terms to the trade and the conditions and agreements on this sheet are recognized as lawful and binding by all the parties hereto. If the shipments are made from other than delivery point specified above, all freight charges will be paid by purchaser, and excess freight charges credited by you upon receipt of original paid freight bills at Rock Island, Ill.

The Conditions and Agreements stated on the back hereof form a part of this contract as fully as if recited at length over the signatures hereto affixed. The signature of the party giving
13 the order will be sufficient evidence of a full knowledge and acceptance of the conditions of this contract.

Prices and Terms.

Steel Walking Plows and Breakers, from list prices shown in catalogue..... ———% discount
Chilled Plows..... ———% discount
Grading and Township Plows..... ———% discount

All Extras, 40% discount from list prices in latest Repair Catalogue.

F. O. B. Rock Island, Ill.

All goods, except Corn Planters, Cultivators, and Hay Loaders:

Due October 1, 1906, with 7½% cash discount May 1, 1906, or within 30 days from date of any invoice,

or 6% cash discount between May 10 and June 1, 1906,

or 5% cash discount between June 10 and July 1, 1906.

Copy.

Cultivators, Corn Planters, and Hay Loaders:

Due November 1, 1906, with 7½% cash discount May 1, 1906, or within 30 days from date of any invoice,

or 6% cash discount between May 10 and June 1, 1906,

or 5% cash discount between June 10 and July 1, 1906.

Highest Legal Rate of Interest After Maturity.

Freight Agreement.

In consideration of the goods herein ordered being a half carload or more, and the shipment is made from Rock Island, Ill., the Rock Island Plow Co. will credit account (at time of settlement, or upon receipt of original freight bill,) excess freight charges over the —— carload rate to —— but there shall be no credit for freight charges on subsequent orders shipped from —— during the season, and no cash discount will be allowed on freight Allowance. All goods sold F. O. B. Rock Island, Ill., unless otherwise stated herein.

14 In Case Goods Herein Ordered Should Be Held for Car to Be Loaded at —— and Same Are Not Called For or no Shipping Instructions Given by —— ——, 190–, You Are at Liberty to Ship Same by Local Freight From —— With the Understanding That No Claims For Excess Freight Will Be Made or Allowed.

Sign Firm Name Here. Brown Bros., by ——. Per F. B.
J. E. SULLIVAN, *Salesman.*

Subject to approval of Rock Island Plow Co., at Rock Island, Ill.

Left.	Right.	Name or No. of implement.	Description of goods ordered.	List prices.	Net prices.
		1	14 x 16 Def single lev Disc & Wh box.....		22 00
		1	3,6 Hill & Drill Cadet & open wheel 28″...		31 00
		1	60 Tooth V B Harrow.....		8 50
		1	#8 B 6 Shovel Blue ribbon Cult Plain.....		13 50
		1	#17 Dictator Disc Cultivator with fenders..		26 50
		1	#418 Bully Boy 6 shovel 1906 cult.....		21 00
	1	.....	X16 Steel beam Hand plow.....		11 28
	1	.....	X14 " " " "		9 90
	1	12″	C T Liberty Gang.....		49 00
	1	.....	A 16 Col Ft lift sulky.....		32 00
		1	#518 Steel beam 6 shovel cult F A H.....		21 00
Ship the above to us at Glasford, Illinois—soon as possible.					
		1	14 x 16 Def single lev Disc with Wh box...		22 00
		1	#16 S B 6 shovel Blue Rib.....		13 50
		1	#418 Bully Boy 6 shov 1906 cult.....		21 00
	1	.....	C T 12 Liberty Gang.....		49 00

Ship the last 4 articles to us at Pekin, Ill., c/o Brown Bros. order car of good too spring trade from Moline or Rock Island R. I. P. Co. will allow freight to either Pekin or Glasford on these goods less switch charge if any when put in mixed car.

15 Number 60.

Name, Brown Bros. Post Office, Pekin. State, Ill. Station, Pekin County. —— Ship from Factory Date quick 1906. Contract dated 12/15, 1906. Salesman, J. E. S.

1906 Agency Contract.

Rock Island Plow Company, Rock Island, Illinois.

Rock Island Plow Company's Branch Houses and Supply Depots:

Kansas City, Mo.	Rock Island Implement Co.
Dallas, Texas	Southern Rock Island Plow Co.
Bloomington, Ill.	Johnson Transfer and Fuel Co.
Omaha, Neb.	Rock Island Plow Co.
Des Moines, Iowa	Hawkeye Transfer Co.
St. Louis, Mo.	McPheeters Warehouse Co.
Indianapolis, Ind.	Union Transfer & Storage Co.
Jackson, Mich.	Jackson Transfer & Storage Co.
Madison, Wis.	Petrie & Harrington.
Memphis, Tenn.	Rock Island Plow Co.
Minneapolis, Minn.	Rock Island Plow Co.
Portland, Ore.	Chas. H. Dodd, Agent.
Sioux City, Iowa	Western Transfer Co.
Sioux Falls, S. D.	H. H. Van Brunt.
Toledo, Ohio	Moreton Truck & Storage Co.
Winnipeg, Man.	John Stevens Co., Limited

Dunn	12	Brad	12
	26		26
	05		05

Copy.
D. not given.
B.

Map and index.	Stock record.	P. & T.	Credit.
1/3/06		D. S. 12/30/05	'Accepted.
Sales record	**Amt. ordered.**	**Order entered.**	**Addresso.**
		Shipping order No. 2428 2429	

New 45 Approved Jan. 2, 1906 Mel. Bogardus, Asst. treas.

16 *Contract*—Continued.

Conditions of Sale.

The party making this order agrees to accept the goods on arrival, pay freight and charges thereon, and in case freight is agreed to be allowed, either wholly or in part, the original paid railroad expense bill shall be forwarded to the Rock Island Plow Company, and proper amount deducted from account at settlement, without interest and without claim for cash discount. No allowance to be made for express upon repairs and extras. Also to look to transportation companies for all losses occasioned by damages to or failure to deliver any goods shipped when receipted for in good order.

Not to countermand this order, refuse to receive the goods herein specified, or have shipment held beyond present season, except upon payment to the Rock Island Plow Company of all freight, storage, damage and other actual outlay and expenses, together with twenty per cent (20%) of the invoice prices of said order, as assessed and liquidated damages.

That no agreements, conditions, or stipulations, verbal or otherwise, save those mentioned in this contract, will be of any force or effect. No claims for damages for trespass of territory, delay in shipping of goods or for shipment by any other than the specified route, or, in case the Rock Island Plow Company is delayed or prevented entirely from shipping the goods herein or hereafter ordered, by reason of fires, strikes or lockouts or other unavoidable causes, or for any cause, will be made; to make no claims for broken hardened shovels, shares, moldboards, landsides, etc., or for other breakages, except in case of clearly manifest defects in material or workmanship; and the Rock Island Plow Company shall have the option of either furnishing a substitute for such defective part or parts free in Rock Island or allow an amount not exceeding the net price of such per their list; same to be held subject to the Rock Island Plow Company's inspection and disposition. The right to claim shortage is hereby waived by the party making this order if not made within five days from receipt of goods.

It is agreed that the delivery of all goods sold, and the time of payment granted to purchaser by terms of this contract, are in reliance upon the credit standing and prospects of business of purchaser as now engaged, communicated direct or through
17 usual commercial channels, and that if the status of the purchaser be not as communicated, or if it be changed hereafter before full payment, by mortgage, loss by fire, sale out of usual course of trade, dissolution, assignment, bankruptcy, attachment or the like then any and all of such indebtedness shall be at our election, without notice, immediately due, or we may treat the same, whether in notes or on account as if the original purchases had been contracted for cash on delivery. It is agreed that the right to the possession of all goods ordered or described generally or specifically in this contract, or which may be ordered and shipped to

purchaser hereafter during life of this contract as herein provided, and the proceeds (in case of sale of same) shall remain in and inure to us, with the effect that we may hold or retake and subject same as security (in the manner described by law for the subjection of chattels and foreclosure of chattel liens of like nature) to the indebtedness hereby contracted until full payment shall have been made by purchaser to our acceptance; and to this end the moneys and notes received on such sales shall be kept separate and apart from other moneys, papers and transactions, but nothing in this shall release purchaser from making payment as stipulated in this contract.

That all goods herein or hereafter ordered are bought and to be sold subject to the usual manufacturer's warranty: "Well made, of good material, and to do good work when properly set up and operated." In the event of an implement failing to perform good work, and after using his best efforts in the field the party making this order is unable to overcome the trouble, immediate notice will be given to the Rock Island Plow Company and sufficient time allowed for instructions to be given, or the sending of a person to put in order. Continued use, however, after one day shall be considered evidence that it fills the warranty and is accepted. That the Rock Island Plow Company shall not be held responsible for the performance of any implement, or part of same, after having been heated or changed by any one away from the factory without their instructions. Also that no goods will be returned to the Rock Island Plow Company without their directions.

In case of death, failure or insolvency of the party making this order, or, if a firm, the death of one member, or should the party making this order, sell, dispose of, or discontinue its business
18 or in case of preferences given other creditors, the right and privilege is hereby given the Rock Island Plow Company under such circumstances, to declare any accounts, notes, or other obligation, growing out of this contract, to be immediately due and payable.

The copy of contract held by the Rock Island Plow Company is to be considered the Original, and to be the binding agreement in case the Duplicate varies from it in any particular.

Acknowledged 1/3/06.

By Sales Department.

Special Notice.

All orders are understood to be for right-handed plows unless otherwise specified.

Upon ordering note particularly the columns for left and right-hand plows.

Upon ordering extra shares for slip share plows, give the number stamped on the under side of the old share, and state whether right or left-hand.

In returning goods to the factory for repairs always note upon the Bill of Lading, "Returned for repairs—half rate," and write

your name upon the back of the shipping tag, that we may identify the goods upon arrival here as coming from you; also write us fully in a letter what is required to be done to the goods.

Charges for telegrams must be prepaid, unless authorized at our expense, and unless in cases where we are entirely at fault.

Remittances must be made with exchange on Chicago, St. Louis, or New York, or in currency, or by express, charges prepaid.

No Checks Accepted.

Accounts past due are subject to sight draft, with interest at the highest legal rate until paid.

All claims for defects should be reported immediately upon their discovery.

All claims for shortage must be made at once upon the receipt of goods, or no allowance can be made.

ROCK ISLAND PLOW CO.

19 EXHIBIT "B."

Dealer's copy.

Original. O2-5M-12-05.

Territory Assigned Pekin & trade.

Always Read What You Sign and There Will Be No Misunderstanding Afterwards.

Contract for Agency for Goods Ordered Herein of Rock Island Plow Co., Rock Island, Ill., for the Season Ending 9/1 1906.

Order.

Dated at PEKIN, ILL., 3/7, 1906.

Rock Island Plow Company, Rock Island, Ill., Please ship on or about the — at once day of ——, 190–, or as soon thereafter as possible, to *To* S. Brown Station Pekin Ill. Postoffice Pekin State
(Name of Dealer.)
Ill. via —— R. R. Pekin less switching chgs. Freights on this order. Peoria Freights on subsequent orders.
the goods below specified.

You may ship earlier, if you choose, provided the time of payment is not thereby changed. This order is given at the discounts named below from current price lists of the Rock Island Plow Co., and net prices set opposite each article described below, due and payable and subject to Cash Discount in accordance with the dates specified opposite each class of goods as hereinafter described under "Prices and Terms." Payments to be made in New York or Chicago exchange, or currency by express, charges prepaid. (Remittances by check at customer's risk. Failure to realize from any cause will be at customer's loss). Subsequent orders during the season are subject to all the conditions of this contract and to changes in prices and discounts without notice. Payable at —— Bank. The terms to the trade and the conditions and agreements

on this sheet are recognized as lawful and binding by all the parties hereto. If the shipments are made from other than delivery point specified above, all freight charges will be paid by purchaser, and excess freight charges credited by you upon receipt of original paid freight bills at Rock Island, Ill.

The Conditions and Agreements stated on the back
20 hereof form a part of this contract as fully as if recited at length over the signatures hereto affixed. The signature of the party giving the order will be sufficient evidence of a full knowledge and acceptance of the conditions of this contract.

Prices and Terms.

Steel Walking Plows and Breakers, from list prices shown in catalogue..... ———% discount
Chilled Plows..... ———% discount
Grading and Township Plows..... ———% discount

All Extras, 40% discount from list prices in latest Repair Catalogue.

F. O. B. Rock Island, Ill.

All goods, except Corn Planters, Cultivators, and Hay Loaders:	Due October 1, 1906, with 7½% cash discount May 1, 1906, or within 30 days from date of any invoice, or 6% cash discount between May 10 and June 1, 1906, or 5% cash discount between June 10 and July 1, 1906.
Copy.	
Cultivators, Corn Planters, and Hay Loaders:	Due November 1, 1906, with 7½% cash discount May 1, 1906, or within 30 days from date of any invoice, or 6% cash discount between May 10 and June 1, 1906, or 5% cash discount between June 10 and July 1, 1906.

Plows Discs & Harrows not sold in spring trade *is* subject to 7½ for cash 9/11/06.

Highest Legal Rate of Interest After Maturity.

Freight Agreement.

In consideration of the goods herein ordered being a half carload or more, and the shipment is made from Rock Island, Ill., the Rock Island Plow Co. will credit account (at time of settlement, or upon receipt of original freight bill,) excess freight charges over the —— carload rate to —— but there shall be no credit for freight charges on subsequent orders shipped from —— during the season, and no cash discount will be allowed on freight allowance. All goods sold F. O. B. Rock Island, Ill., unless otherwise stated herein.

In Case Goods Herein Ordered Should Be Held for Car to Be Loaded at —— and Same Are Not Called For or no Shipping Instructions Given by —— ——, 190–, You Are at Liberty to Ship Same by Local Freight From —— With the Understanding That No Claims For Excess Freight Will Be Made or Allowed.

Sign Firm Name here. Fo. S. Brown. By Frank Brown.

J. E. SULLIVAN, *Salesman.*

Subject to approval of Rock Island Plow Co., at Rock Island, Ill.

Carry-Over Rider.

If so much as one-fourth or less of the invoiced amount of the goods ordered herein (not meaning goods ordered subsequently or carried over from a previous season nor repairs specified herein) are on hand at time of settlement, the party of the second part agrees to accept, and the party of the first part agrees to give a note to cover amount of same, payable October 1st, 1907, with seven per cent (7 per cent) interest after maturity, payable with exchange and collection charges, endorsed with a condition that:

"This note is subject to a discount of five (5) per cent if cash is remitted to the Rock Island Plow Co. at Rock Island, Ill., on or before May 1st, 1907."

Upon failure or refusal to execute a note in settlement as so provided, this "Carry Over Clause" is null and void and the full amount of account growing out of contract to which this is pasted becomes due and payable at regular maturity date as fixed by Terms of Settlement upon page 5 of agreement to which this rider is attached, and neither shall this clause be construed as releasing the first party from giving notes in settlement as shipments are made, as provided for by the regular contract.

22 EXHIBIT B.

Left.	Right.	Name or No. of implement.	Description of goods ordered.	List prices.	Net prices.
	2	12″	C T Liberty Gangs with ex shares	51 50	103 00
	2		#518 F A H Cultivator	21 00	42 00
	2		#418 B. Boy "	21 00	42 00
	1		14x16 Bonanza cut out with no Box		24 00
	3		14x16 Bonanza Round	22 50	67 50
	2		X14 S/B Walk Plow	9 90	19 80
	1		X14 Wood Beam Plow		9 90
	1		Cadet Hill & Drill Planter with less marker.	3/6	30 00
		1	80 Rd roll 3/6 Wire	03	2 40
					340 60

Invoice this bill
To S. Brown,
Pekin, Ill.

1 Large Sign
2 Catalogues
1 Repair Catalogue
1 Box Printed matter on full line.

Number 60. 340#60.

Name Fo. S. Brown. Post Office, Pekin. State, Ill. Station, Pekin. County, Towwell. Ship from fact. Date, quick, 1906. Contract dated 3/7 1906. Salesman, J. E. S.

1906 Agency Contract.

Rock Island Plow Company, Rock Island, Illinois.

Rock Island Plow Company's Branch Houses and Supply Depots:

Kansas City, Mo. ..... Rock Island Implement Co.
Dallas, Texas ..... Southern Rock Island Plow Co.
Bloomington, Ill. ..... Johnson Transfer and Fuel Co.
Omaha, Neb. ..... Rock Island Plow Co.
Des Moines, Iowa ..... Hawkeye Transfer Co.
St. Louis, Mo. ..... McPheeters Warehouse Co.
Indianapolis, Ind. ..... Union Transfer & Storage Co.
Jackson, Mich. ..... Jackson Transfer & Storage Co.
Madison, Wis. ..... Petrie & Harrington.
Memphis, Tenn. ..... Rock Island Plow Co.
Minneapolis, Minn. ..... Rock Island Plow Co.
Portland, Ore. ..... Chas. H. Dodd, Agent.
Sioux City, Iowa ..... Western Transfer Co.
Sioux Falls, S. D. ..... H. H. Van Brunt.
23 Toledo, Ohio ..... Moreton Truck & Storage Co.
Winnipeg, Man. ..... John Stevens Co., Limited.

Copy.
J. 3½.
W. D.
Rush.

3—98

Map and index.	Stock record.	P. & T.	Credit.
		D. T. 3/8/06	Accepted D. T. 3/9/06
Sales record.	Amt. ordered.	Order entered.	Addresso.
		Shipping order No. 4875	

Contract—Continued.

Conditions of Sale.

The party making this order agrees to accept the goods on arrival, pay freight and charges thereon, and in case freight is agreed to be allowed, either wholly or in part, the original paid railroad expense bill shall be forwarded to the Rock Island Plow Company, and proper amount deducted from account at settlement, without interest and without claim for cash discount. No allowance to be made for express upon repairs and extras. Also to look to transportation companies for all losses occasioned by damages to or failure to deliver any goods shipped when receipted for in good order.

Not to countermand this order, refuse to receive the goods herein specified, or have shipment held beyond present season, except upon payment to the Rock Island Plow Company of all freight, storage, damage and other actual outlay and expenses, together with twenty per cent (20%) of the invoice prices of said order, as assessed and liquidated damages.

That no agreements, conditions, or stipulations, verbal or otherwise, save those mentioned in this contract, will be of any force or effect. No claims for damages for trespass of territory, delay in shipping of goods or for shipment by any other than the specified route, or, in case the Rock Island Plow Company is delayed or prevented entirely from shipping the goods herein or hereafter
24 ordered, by reason of fires, strikes or lockouts or other unavoidable causes, or for any cause, will be made; to make no claims for broken hardened shovels, shares, moldboards, landsides, etc., or for other breakages, except in case of clearly manifest defects in material or workmanship; and the Rock Island Plow Company shall have the option of either furnishing a substitute for such defective part or parts free in Rock Island or allow an amount not exceeding the net price of such per their list; same to be held subject to the Rock Island Plow Company's inspection and disposition. The right to claim shortage is hereby waived by the party making this order if not made within five days from receipt of goods.

It is agreed that the delivery of all goods sold, and the time of payment granted to purchaser by terms of this contract, are in reliance upon the credit standing and prospects of business of purchaser as now engaged, communicated direct or through usual commercial channels, and that if the status of the purchaser be not as communicated, or if it be changed thereafter before full payment, by mortgage, loss by fire, sale out of usual course of trade, dissolution, assignment, bankruptcy, attachment or the like then any and all of such indebtedness shall be at our election, without notice, immediately due, or we may treat the same, whether in notes or on account as if the original purchases had been contracted for any force or effect. No claims for damages for trespass of cash on delivery. It is agreed that the right to the possession of all goods ordered or described generally or specifically in this contract, or which may be ordered and shipped to purchaser hereafter during life of this contract as herein provided, and the proceeds (in case of sale of same) shall remain in and inure to us, with the effect that we may hold or retake and subject same as security (in the manner described by law for the subjection of chattels and foreclosure of chattel liens of like nature) to the indebtedness hereby contracted until full payment shall have been made by purchaser to our acceptance; and to this end the moneys and notes received on such sales shall be kept separate and apart from other moneys, papers and transactions, but nothing in this shall release purchaser from making payment as stipulated in this contract.

That all goods herein or hereafter ordered are bought and to be sold subject to the usual manufacturer's warranty: "Well made, of good material, and to do good work when properly set up and operated." In the event of an implement failing to perform good work, and after using his best efforts in the field the party making this order is unable to overcome the trouble, immediate notice will be given to the Rock Island Plow Company and sufficient time allowed for instructions to be given, or the sending of a person to put in order. Continued use, however, after one day shall be considered evidence that it fills the warranty and is accepted. That the Rock Island Plow Company shall not be held responsible for the performance of any implement, or part of same, after having been heated or changed by any one away from the factory without their instructions. Also that no goods will be returned to the Rock Island Plow Company without their directions.

In case of death, failure or insolvency of the party making this order, or, if a firm, the death of one member, or should the party making this order, sell, dispose of, or discontinue its business or in case of preferences given other creditors, the right and privilege is hereby given the Rock Island Plow Company under such circumstances, to declare any accounts, notes, or other obligation, growing out of this contract, to be immediately due and payable.

The copy of contract held by the Rock Island Plow Company is to be considered the Original, and to be the binding agreement in case the Duplicate varies from it in any particular.

Acknowledged 3/9/06.

By Sales Department.

Special Notice.

All orders are understood to be for right-handed plows unless otherwise specified.

Upon ordering note particularly the columns for left and right-hand plows.

Upon ordering extra shares for slip share plows, give the number stamped on the under side of the old share, and state whether right or left-hand.

In returning goods to the factory for repairs always note upon the Bill of Lading, "Returned for repairs—half rate," and write your name upon the back of the shipping tag, that we may identify the goods upon arrival here as coming from you; also write us fully in a letter what is required to be done to the goods.

Charges for telegrams must be prepaid, unless authorized at our expense, and unless in cases where we are entirely at fault.

26 Remittances must be made with exchange on Chicago, St. Louis, or New York, or in currency, or by express, charges prepaid.

No Checks Accepted.

Accounts past due are subject to sight draft, with interest at the highest legal rate until paid.

All claims for defects should be reported immediately upon their discovery.

All claims for shortage must be made at once upon the receipt of goods, or no allowance can be made.

ROCK ISLAND PLOW CO.

EXHIBIT "C."

Dealer's copy.

Original. O2-5M-12-'05.

Territory Assigned, Glasford, Ill.

Always Read What You Sign and There Will Be No Misunderstanding Afterwards.

Contract for Agency for Goods Ordered Herein of Rock Island Plow Co., Rock Island, Ill., for the Season Ending 9 1 1906.

Order.

Dated at Glasford, Ill., 3/7 1906.

Rock Island Plow Company, Rock Island, Ill., Please ship on or about the at once, 190– or as soon thereafter as possible to Brown Bros. Station Glasford Postoffice Glasford State Ill. via (Name of Dealer)

—— R. R.

Glasford less switch chgs. Freights on this order.

Peoria Freights on subsequent orders.

the goods below specified.

You may ship earlier, if you choose, provided the time of payment is not thereby changed. This order is given at the discounts named below from current price lists of the Rock Island Plow Co., and net prices set opposite each article described below, due and

payable and subject to Cash Discount in accordance with the dates specified opposite each class of goods as hereinafter described under "Prices and Terms." Payments to be made in New York or Chicago exchange, or currency by express, charges prepaid. (Remittances by check at customer's risk. Failure to realize from any cause will be at customer's loss). Subsequent orders during the season are subject to all the conditions of this contract and to
27 changes in prices and discounts without notice. Payable at —— Bank. The terms to the trade and the conditions and agreements on this sheet are recognized as lawful and binding by all the parties hereto. If the shipments are made from other than delivery point specified above, all freight charges will be paid by purchaser, and excess freight charges credited by you upon receipt of original paid freight bills at Rock Island, Ill.

The Conditions and Agreements stated on the back hereof form a part of this contract as fully as if recited at length over the signatures hereto affixed. The signature of the party giving the order will be sufficient evidence of a full knowledge and acceptance of the conditions of this contract.

Prices and Terms.

Steel Walking Plows and Breakers, from list prices shown in catalogue..... ———% discount
Chilled Plows..... ———% discount
Grading and Township Plows..... ———% discount

All Extras, 40% discount from list prices in latest Repair Catalogue.

F. O. B. Rock Island, Ill.

All goods, except Corn Planters, Cultivators, and Hay Loaders:

Due October 1, 1906, with 7½% cash discount May 1, 1906, or within 30 days from date of any invoice,

or 6% cash discount between May 10 and June 1, 1906,

or 5% cash discount between June 10 and July 1, 1906.

Copy.

Cultivators, Corn Planters, and Hay Loaders:

Due November 1, 1906, with 7½% cash discount May 1, 1906, or within 30 days from date of any invoice,

or 6% cash discount between May 10 and June 1, 1906,

or 5% cash discount between June 10 and July 1, 1906.

Plows Discs & Harrows not sold as spring trade subject to 7½ for cash Sept. 15, '06.

Highest Legal Rate of Interest After Maturity.

28 Freight Agreement.

In consideration of the goods herein ordered being a half carload or more, and the shipment is made from Rock Island, Ill., the Rock Island Plow Co. will credit account (at time of settlement, or upon receipt of original freight bill,) excess freight charges over the —— carload rate to —— but there shall be no credit for freight charges on subsequent orders shipped from —— during the season, and no cash discount will be allowed on freight allowance. All goods sold F. O. B. Rock Island, Ill., unless otherwise stated herein.

In Case Goods Herein Ordered Should Be Held for Car to Be Loaded at —— and Same Are Not Called For or no Shipping Instructions Given by —— ——, 190–, You Are at Liberty to Ship Same by Local Freight From —— With the Understanding That No Claims For Excess Freight Will Be Made or Allowed.

Sign Firm Name here. Brown Bros. Per F. B. By —— ——.

J. E. SULLIVAN, *Salesman.*

Subject to approval of Rock Island Plow Co., at Rock Island, Ill.

Carry-Over Rider.

If so much as one-fourth or less of the invoiced amount of the goods ordered herein (not meaning goods ordered subsequently or carried over from a previous season nor repairs specified herein) are on hand at time of settlement, the party of the second part agrees to accept, and the party of the first part agrees to give a note to cover amount of same, payable October 1st, 1907, with seven per cent (7 per cent) interest after maturity, payable with exchange and collection charges, endorsed with a condition that:

"This note is subject to a discount of five (5) per cent if cash is remitted to the Rock Island Plow Co. at Rock Island, Ill., on or before May 1st, 1907."

Upon failure or refusal to execute a note in settlement as so provided, this "Carry Over Clause" is null and void and the full amount of account growing out of contract to which this is pasted becomes due and payable at regular maturity date as fixed by "Terms
29 of Settlement" upon page 5 of agreement to which this rider is attached, and neither shall this clause be construed as releasing the first party from giving notes in settlement as shipments are made, as provided for by the regular contract.

Left.	Right.	Name or No. of implement.	Description of goods ordered.	List prices.	Net prices.
	3	14 x 16	Bonz. Disc with wh Boxes	22 50	67 50
	1	14 x 16	" " Cutout		24 00
	1	14 x 16	Def. Disc S G		22 00
	2	60	Tooth U Bar Harrow	8 50	17 00
	2	60	" Pipe "	8 50	17 00
	2	90	" " "	12 75	25 50
	2	90	" W "	"	25 50
	2	F. A. H.	Cult 6 Shovel #518	21 00	42 00
	2	B B	#418	21 00	42 00
3	12″	C. T.	Liberty Gangs with ex shares	51 50	154 50
2	16″	T & S	Col. ft lift Sulky	32 00	64 00
2		X14	S. B Walk Plow	9 90	19 80
	1	80 Bal	3/6 Wire	3	2 40
	1	Large Sign			
	2	Catalogues			
	1	Repair Book			
	1	Box Printed matter Covering above			

Brown Bros., Glasford, Ill., Bill Car to Glasford stop over Pekin.
This order put in ford. end of car.
Pekin order next Veile Car Co. to bal Car.

Brown Bros.
Per F. B.

Number 94. 523. 20.

Name, Brown Bros. Post Office, Glasford. State, Ill. Station, Glasford, County, Ill. Ship from fact. Date, quick, 1906. Contract dated 3/7 1906. Salesman, J. E. S.

1906 Agency Contract.

Rock Island Plow Company, Rock Island, Illinois.

Rock Island Plow Company's Branch Houses and Supply Depots:

Kansas City, Mo. ..... Rock Island Implement Co.
Dallas, Texas ..... Southern Rock Island Plow Co.
Bloomington, Ill. ..... Johnson Transfer and Fuel Co.
Omaha, Neb. ..... Rock Island Plow Co.
Des Moines, Iowa ..... Hawkeye Transfer Co.
St. Louis, Mo. ..... McPheeters Warehouse Co.
Indianapolis, Ind. ..... Union Transfer & Storage Co.
30 Jackson, Mich. ..... Jackson Transfer & Storage Co.
Madison, Wis. ..... Petrie & Harrington.
Memphis, Tenn. ..... Rock Island Plow Co.
Minneapolis, Minn. ..... Rock Island Plow Co.
Portland, Ore. ..... Chas. H. Dodd, Agent.
Sioux City, Iowa ..... Western Transfer Co.
Sioux Falls, S. D. ..... H. H. Van Brunt.

Toledo, Ohio..... Moreton Truck & Storage Co.
Winnipeg, Man..... John Stevens Co., Limited.
Copy.
—4.
B—not given.
Rush.

Map and index.	Stock record.	P. & T.	Credit.
6/1/06		D. L. 3/8/06	Accepted D. L. 3/9/06
Sales record.	Amt. ordered.	Order entered.	Addresso.
		Shipping order No. 4873	

New.

Contract—Continued.

Conditions of Sale.

The party making this order agrees to accept the goods on arrival, pay freight and charges thereon, and in case freight is agreed to be allowed, either wholly or in part, the original paid railroad expense bill shall be forwarded to the Rock Island Plow Company, and proper amount deducted from account at settlement, without interest and without claim for cash discount. No allowance to be made for express upon repairs and extras. Also to look to transportation companies for all losses occasioned by damages to or failure to deliver any goods shipped when receipted for in good order.

Not to countermand this order, refuse to receive the goods herein specified, or have shipment held beyond present season, except upon payment to the Rock Island Plow Company of all freight, storage, damage and other actual outlay and expenses, together with twenty per cent (20%) of the invoice prices of said order, as assessed and liquidated damages.

31 That no agreements, conditions, or stipulations, verbal or otherwise, save those mentioned in this contract, will be of any force or effect. No claims for damages for trespass of territory, delay in shipping goods or for shipment by any other than the specified route, or, in case the Rock Island Plow Company is delayed or prevented entirely from shipping the goods herein or hereafter ordered, by reason of fires, strikes or lockouts or other unavoidable causes, or for any cause, will be made; to make no claims for broken hardened shovels, shares, moldboards, landsides, etc., or for other breakages, except in case of clearly manifest defects in material

or workmanship; and the Rock Island Plow Company shall have the option of either furnishing a substitute for such defective part or parts free in Rock Island or allow an amount not exceeding the net price of such per their list; same to be held subject to the Rock Island Plow Company's inspection and disposition. The right to claim shortage is hereby waived by the party making this order if not made within five days from receipt of goods.

It is agreed that the delivery of all goods sold, and the time of payment granted to purchaser by terms of this contract, are in reliance upon the credit standing and prospects of business of purchaser as now engaged, communicated direct or through usual commercial channels, and that if the status of the purchaser be not as communicated, or if it be changed hereafter before full payment, by mortgage, loss by fire, sale out of usual course of trade, dissolution, assignment, bankruptcy, attachment or the like then any and all of such indebtedness shall be at our election, without notice, immediately due, or we may treat the same, whether in notes or on account as if the original purchases had been contracted for cash on delivery. It is agreed that the right to the possession of all goods ordered or described generally or specifically in this contract, or which may be ordered and shipped to purchaser hereafter during life of this contract as herein provided, and the proceeds (in case of sale of same) shall remain in and inure to us, with the effect that we may hold or retake and subject same as security (in the manner described by law for the subjection of chattels and foreclosure of chattel liens of like nature) to the indebtedness hereby contracted until full payment shall have been made by purchaser to our acceptance; and to this end the moneys and notes received on such sales shall
32 be kept separate and apart from other moneys, papers and transactions, but nothing in this shall release purchaser from making payment as stipulated in this contract.

That all goods herein or hereafter ordered are bought and to be sold subject to the usual manufacturer's warranty: "Well made, of good material, and to do good work when properly set up and operated." In the event of an implement failing to perform good work, and after using his best efforts in the field the party making this order is unable to overcome the trouble, immediate notice will be given to the Rock Island Plow Company and sufficient time allowed for instructions to be given, or the sending of a person to put in order. Continued use, however, after one day shall be considered evidence that it fills the warranty and is accepted. That the Rock Island Plow Company shall not be held responsible for the performance of any implement, or part of same, after having been heated or changed by any one away from the factory without their instructions. Also that no goods will be returned to the Rock Island Plow Company without their directions.

In case of death, failure or insolvency of the party making this order, or, if a firm, the death of one member, or should the party making this order, sell, dispose of, or discontinue its business or in case of preferences given other creditors, the right and privilege is

hereby given the Rock Island Plow Company under such circumstances, to declare any accounts, notes, or other obligation, growing out of this contract, to be immediately due and payable.

The copy of contract held by the Rock Island Plow Company is to be considered the Original, and to be the binding agreement in case the Duplicate varies from it in any particular.

Acknowledged 3/9/06.

By Sales Department.

33 *Special Notice.*

All orders are understood to be for right-handed plows unless otherwise specified.

Upon ordering note particularly the columns for left and right-hand plows.

Upon ordering extra shares for slip share plows, give the number stamped on the under side of the old share, and state whether right or left-hand.

In returning goods to the factory for repairs always note upon the Bill of Lading, "Returned for repairs—half rate," and write your name upon the back of the shipping tag, that we may identify the goods upon arrival here as coming from you; also write as fully in a letter what is required to be done to the goods.

Charges for telegrams must be prepaid, unless authorized at our expense, and unless in cases where we are entirely at fault.

Remittances must be made with exchange on Chicago, St. Louis, or New York, or in currency, or by express, charges prepaid.

No Checks Accepted.

Accounts past due are subject to sight draft, with interest at the highest legal rate until paid.

All claims for defects should be reported immediately upon their discovery.

All claims for shortage must be made at once upon the receipt of goods, or no allowance can be made.

ROCK ISLAND PLOW CO.

34 In the District Court of the United States, Southern District of Illinois, Northern Division, at Peoria.

In Bankruptcy.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,

vs.

THE ROCK ISLAND PLOW COMPANY (a Corporation).

Certificate of Counsel.

We, Walter H. Kirk and Connelly & Connelly counsel and solicitors for Rock Island Plow Company, defendant, in the above entitled

cause, do hereby certify that in our opinion the above and foregoing Plea in Abatement is well founded in point of law.

WALTER H. KIRK,
CONNELLY & CONNELLY,
Solicitors for Rock Island Plow Company, Defendant.

Affidavit of Phil Mitchell.

In the District Court of the United States, Southern District of Illinois, Northern Division, at Peoria.

In Bankruptcy.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
THE ROCK ISLAND PLOW COMPANY (a Corporation).

Affidavit.

STATE OF ILLINOIS,
County of Rock Island, ss:

Phil Mitchell, of Rock Island County, being first duly sworn on his oath, says that he is President of Rock Island Plow Com-
35 pany, a corporation, defendant, in the above entitled cause, and that he has read and heard read the above and foregoing plea and that the same is true in point of fact and that it is not interposed for delay.

PHIL MITCHELL.

Subscribed and sworn to before me this 25th day of March, A. D. 1908.

[NOTARIAL SEAL.] K. T. ANDERSON,
Notary Public.

Endorsed: No. 148.—In the District Court of the United States, Southern District of Illinois, Northern Division at Peoria.—W. J. Reardon, Trustee in Bankruptcy of Frank Brown, Bankrupt, vs. Rock Island Plow Company (a corporation).—The Plea of Rock Island Plow Company to the Bill of Complaint of W. J. Reardon, Trus-
1908*
tee of Frank Brown.—Filed Mar. 27—(1906†) at 4.40 o'clock P. M., R. C. Brown, Clerk.

And afterwards to-wit: on the 16th day of April, A. D. 1908, the following further proceedings were had in said court in said cause and entered of record as follows:

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* In red ink in copy.
† Erased in copy.

Order of April 16, 1908.

In Equity.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
ROCK ISLAND PLOW COMPANY, a Corporation.

On motion of the complainant it is ordered by the Court that said complainant have leave to amend his bill of complaint heretofore filed herein.

And thereupon the Complainant, by Covey & Covey, his solicitors filed in the office of the Clerk of this Court, his amendment to the bill of complaint herein; which amendment is in the words and figures as follows, to-wit:

36 *Amendment to Bill of Complaint.*

Filed April 16, 1908.

In the District Court of the United States, Southern District of Illinois, Northern Division.

In Bankruptcy.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
ROCK ISLAND PLOW COMPANY.

Now comes W. J. Reardon, Trustee in bankruptcy of Frank Brown bankrupt, complainant, in the above entitled cause, leave of court having first been obtained and amends his bill of complaint heretofore filed herein by inserting on Page two of said bill, immediately after the word "Company" at character "A" on said page the following to-wit:

"Your orator further represents that previous to the filing of the original bill of complaint in this cause on to-wit the 21st day of January, A. D. 1908 your orator as trustee in bankruptcy of said Frank Brown, bankrupt, filed with the Honorable Edward U. Henry, one of the referees in bankruptcy of said District Court and before whom said proceedings in bankruptcy were then pending, a petition in which it was alleged, among other things, that the Peoria Cordage Company, a corporation, one of the creditors, of said bankrupt, obtained a judgment by confession against said bankrupt in the County Court of Peoria County, Illinois on November 13, 1907 for the sum of Two Hundred and forty seven and 15/100 ($247.15) Dollars and Four ($4.00) Dollars costs of suit and that execution was issued on said judgment on the said 13th day of November 1907 to the Sheriff of Tazewell County, Illinois, (that being the County in which the said bankrupt resided and did business) and that said execution

was received and duly endorsed by the said Sheriff on the 14th day of November, 1907 and became a lien on all the real and personal property of said bankrupt located in said Tazewell County from and after the 14th day of November 1907 and so remained until after the voluntary petition in bankruptcy was filed herein on the 27th day of November 1907 and it was also alleged in said petition that D. M. Sechler Carriage Co., a corporation, another of the
37 creditors of the bankrupt, Frank Brown, obtained a judgment in the County court of Peoria County, Illinois, by confession against the said Frank Brown on November 13, 1907 for the sum of Two Hundred and eighty two and 25/100 ($282.25) Dollars and Four ($4.00) Dollars costs of suit and that execution was thereafter issued on said judgment on the 23rd day of November 1908 and was duly received and endorsed by the Sheriff of Tazewell County (that being the County in which the said bankrupt resided and did business) on to-wit the 24th day of November, A. D. 1907 and that said execution was still in the hands of the Sheriff of said Tazewell County, wholly unsatisfied and that said execution was a lien on all the real and personal property of said bankrupt located in said Tazewell County on the said 24th day of November 1907 down to the date of the filing of said voluntary petition in bankruptcy.

And your orator further represents that it was also further alleged in said petition that it is provided by Section 67, paragraphs C. and F. of the Act of Congress relating to Bankruptcy that all levies, judgments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the levy, judgment or other lien, shall be deemed wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall order that the right, under such levy, judgment or other lien, shall be preserved for the benefit of the estate; that said petition prayed that the liens of said judgment and execution be declared by the court to be null and void as to the said D. M. Sechler Carriage Company and Peoria Cordage Company, but that said liens be preserved for the benefit of said estate in bankruptcy.

Your orator further represents that a hearing was thereupon had upon said petition before the said Referee and that the said creditor, Peoria Cordage Company and D. M. Sechler Carriage Company, entered their appearance before the said Referee and consented that the prayer of said petition be granted and thereupon the said referee entered an order in said cause on the 21st day of January, A. D. 1908 which said order was in words and figures following to-wit:

38 *Order of Referee.*

"In the District Court of the United States, Southern District of Illinois, Northern Division.

In Bankruptcy.

In the Matter of FRANK BROWN, Bankrupt.

At Peoria, in said District and Division, on the 21st Day of January, A. D. 1908, Before the Honorable Edward U. Henry, Referee in Bankruptcy.

This cause coming on now to be heard upon the petition of W. J. Reardon, trustee of the above named bankrupt estate for an order declaring the liens of the judgments and executions issued thereon of the Peoria Cordage Company and D. M. Sechler Carriage Company in the County Court of Peoria County, Illinois be declared null and void as against the said judgment creditors but that the lien of said judgments and executions be preserved for the benefit of said estate in bankruptcy and the said Peoria Cordage Company and D. M. Sechler Carriage Company appearing herein by their attorneys and consenting to the entry of such order and it appearing to the court that the matters and things set forth in said petition filed herein by said trustee are substantially true and that the D. M. Sechler Carriage Company, a corporation, obtained a judgment against Frank Brown, bankrupt, on November 23, 1907, in the County Court of Peoria County, Illinois, for the sum of Two Hundred and eighty two and 25/100 ($282.25) Dollars and Four ($4.00) — costs of suit and that an execution was issued on said judgment to the Sheriff of Tazewell County, Illinois on the 23rd day of November 1907 and that said execution was received by said sheriff on the 24th day of November 1907 and duly endorsed by him and became a lien on all of the real and personal property of said bankrupt in the said County of Tazewell down until the filing of said involuntary petition in bankruptcy on the 27th day of November 1907 and that said execution is still in the hands of the Sheriff of said Tazewell
39 County wholly unsatisfied and the court further finding that the Peoria Cordage Company, a corporation, also obtained a judgment in the County court of Peoria County, Illinois, against the said Frank Brown, bankrupt on November 13, 1907 for the sum of Two hundred and forty seven and 15/100 ($247.15) Dollars and Four (4.00) Dollars costs of suit and that an execution was issued on said judgment on the 13th day of November 1907 and that said execution was duly received and endorsed by said sheriff on the 14th day of November 1907 and that said execution became and was a lien on all the real and personal property of said bankrupt until the filing of said voluntary petition in bankruptcy and that said judgment is still unsatisfied and that the court further finding that it is in the interest of said bankrupt estate that the liens of said judgments

and executions be preserved for the benefit of said estate in bankruptcy and there being no *no* opposing interests herein it is

Ordered by the court that the said liens obtained through the said judgments and executions of D. M. Sechler Carriage Company, a corporation and the Peoria Cordage Company, a corporation, be and they are hereby declared null and void as to the said D. M. Sechler Carriage Company and the Peoria Cordage Company but that the said liens of said judgments and executions be and they are hereby ordered preserved for the benefit of said estate in bankruptcy.

EDWARD U. HENRY, *Referee.*"

Your orator further represents that the effect of said order of said Referee in said bankruptcy proceedings was and is to preserve the liens of said judgments and execution for the benefit of said estate in bankruptcy and that your orator now occupies the position as against the said defendant herein and all other persons interested in said bankrupt estate, of a judgment and execution creditor as of the dates of the rendition of said judgments and the issuance of executions thereon and that your orator at the time that the said defendant obtained the preferences mentioned in the original bill herein, in legal effect, had a lien for the benefit of said bankrupt estate in the property delivered by the said bankrupt to the said defendant in payment of the notes of the bankrupt held by the said defendant and that said lien was superior to any claim which the said defendant had to the goods received by the defendant from the said bankrupt.

W. J. REARDON,
Trustee in Bankruptcy.

COVEY & COVEY,
Solicitors for Complainant.

STATE OF ILLINOIS,
County of Peoria, ss:

Ira J. Covey being first duly sworn says that he is one of the attorneys for W. J. Reardon, trustee, etc., complainant in the foregoing amendment to the bill of complaint and that affiant knows the contents thereof and that the matters and things therein contained are true according to the best of his knowledge, information and belief.

IRA J. COVEY.

Subscribed and sworn to before me this 15 day of April, A. D. 1908.

[NOTARIAL SEAL.] M. I. McCLINTOCK,
Notary Public.

Endorsed: #148. W. J. Reardon, Trustee etc. —vs.— Rock Island Plow Co. Amendment to Bill—Filed Apr. 16 1908 R. C. Brown, Clerk.

And afterwards to-wit; on the twenty first day of April in the year of our Lord one thousand nine hundred and eight came again the

defendant by Walter H. Kirk, its solicitor and filed in said Clerk's office the Plea of said Defendant to the Amended Bill of Complaint of the complainant herein, which said Plea is as follows, to-wit;

41 In the District Court of the United States, Southern District of Illinois, Northern Division.

In Chancery.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
ROCK ISLAND PLOW COMPANY (a Corporation).

The Plea of the Rock Island Plow Company (a Corporation), Defendant to the Bill of Complaint of W. J. Reardon, Trustee in Bankruptcy of Frank Brown, Bankrupt.

This defendant, by protestation, not confessing or acknowledging all or any of the matter and things in the complainant's said bill of complaint mentioned, to be true, in such manner and form, as the same are therein and thereby set forth and alleged, doth plead thereto, and for plea says;

That long prior to the date of the adjudication in bankruptcy herein of the said Frank Brown, bankrupt, which said adjudication is alleged in and by complainant's bill of complaint herein to have been had on the Twenty-seventh day of November 1907, the said Frank Brown, bankrupt, obtained all the "goods, wares and merchandise, consisting of gang-plows, cultivators, harrows, pulverizers and other farm implements" which are now involved in this proceeding of and from the defendant under and by virtue of the terms and conditions of certain written contracts signed by the said Frank Brown, bankrupt, to-wit; under and by virtue of one certain written contract signed by said bankrupt in the name of "Brown Bros. By Per F. B." at Pekin, Illinois on the 15th day of December 1905; to-wit; under and by virtue of another such written contract signed also by said bankrupt in the name of "F. & S. Brown, By Frank Brown" at Pekin, Illinois on the 7th day of March 1906; and, to-wit, under and by virtue of another such written contract also signed by the said bankrupt in the name of "Brown Bros. Per F. B." at Glasford, Ill. on the 7th day of March 1906; true and correct copies of all which contracts are hereto attached, hereby referred
42 to and made parts hereof and marked respectively Exhibits "A" "B" and "C"; to-wit, are attached to and made parts of the certain plea filed herein on the Twenty-seventh day of March A. D. 1908 by this defendant and said copies are by leave of court here and now refiled and referred to and made parts hereof for greater certainty.

That none of the goods, wares and merchandise now in question or involved in this proceeding were at any time in the custody, possession or control of the said Frank Brown, bankrupt, except under and by virtue of some one or all of the aforesaid written contracts, and that in and by each and every one of the said written contracts,

it was among other provisions therein contained, expressly provided and conditioned as follows, namely;

"It is agreed that the delivery of all goods sold, and the time of "payment granted to purchaser by terms of this contract, are in re- "liance upon the credit standing and prospects of business of pur- "chaser as now engaged, communicated direct or through usual "commercial channels, and that if the status of the purchaser be not "as communicated, or if it be changed hereafter before full payment "by mortgage, loss by fire, sale out of usual course of trade, dissolu- "tion, assignment, bankruptcy, attachment or the like then any "and all of such indebtedness shall be at our election, without notice, "immediately due, or we may treat the same, whether in notes or on "account as if the original purchases had been contracted for cash "on delivery.

"It is agreed that the right to the possession of all goods ordered "or described generally or specifically in this contract or which may "be ordered and shipped to purchaser hereafter during the life of "this contract as herein provided, and the proceeds (in case of sale "of same) shall remain in and inure to us, with the effect that we "may hold or retake and subject same as security (in the manner "described by law for the subjection of chattels and foreclosure of "chattel leins of like nature) to the indebtedness hereby contracted "until full payment shall have been made by purchaser to our ac- "ceptance; and to this end the moneys and notes received on such "sales shall be kept separate and apart from other moneys, papers "and transactions, but nothing in this shall release purchaser from "making payment as stipulated in this contract.

That until paid for by the said Frank Brown, bankrupt,
43 pursuant to the said written contracts, all of the said goods, wares and merchandise was and remained *all* all times the property of and belonging to the said defendant; that on the 25th day of November 1907 the said Frank Brown, bankrupt, had not paid to the defendant the purchase price according to the said written contracts of and for the said goods, wares and merchandise involved in and forming the subject matter of this proceeding, and that the de-
lawfully*
fendant then and there ^ retook and repossessed itself of the same;

That the said Frank Brown, bankrupt, did not then and there on to-wit, the 25th day of November 1907 transfer to this defendant any goods, wares and merchandise which then and there were the property of and belonged to the said Frank Brown, bankrupt, but that the said Frank Brown, bankrupt, did then and there pursuant to the said written contracts under which the said goods, wares and merchandise were then and there held by him, deliver over to the said defendant the actual possession of the said goods, wares and merchandise and that the same then and there belonged in no part or parcel to the said bankrupt, but were then and there the exclusive property and effects of and belonging to the defendant, under and by virtue of the aforesaid written contract;

[* In red ink in copy.]

That the title to the said goods, wares and merchandise was never at any time vested in the said Frank Brown, bankrupt, but that the same always was and remained in the defendant, and that the same formed no part or parcel of the bankrupt estate or assets of the said Frank Brown, bankrupt.

That the said defendant on the said 25th day of November 1907 was not then and there a creditor of the said Frank Brown, bankrupt, and that in then and there taking possession of its property out of the hands of the said Frank Brown, Bankrupt, the defendant was not*

^ then and there a creditor of the said bankrupt within the meanings of the Acts of Congress relating to bankruptcy; and that the same did not then and there amount to an unlawful preference of the said Rock Island Plow Company over the other creditors of the said Frank Brown, bankrupt.

That on the 25th day of November A. D. 1907, when said defendant seized and took into its own possession, and out of the possession of the bankrupt, all the said goods, wares and merchandise,
all of which, as aforesaid, it had theretofore sold and delivered
44 to said bankrupt, under the terms and provisions of the aforesaid conditional sales contracts, as aforesaid, no valid or sufficient levy had at any time therefore been made upon any of said goods, wares and merchandise then and there in the hands of said bankrupt, by the said Sheriff of Tazewell County, Illinois under or by virtue of the said execution issued into the hands of the said Sheriff on the 14th day of November A. D. 1907 out of the County Court of Peoria County Illinois for the sum of Two Hundred Forty-seven and 15/100 ($247.15) Dollars debt and Four ($4.00) Dollars costs of suit, upon the said judgment confessed on November 15th A. D. 1907 in said Court by the said bankrupt in favor of the said Peoria Cordage Company (a corporation) one of the alleged creditors of the said bankrupt; and, that no valid or sufficient levy had at any time theretofore been made upon any of the said goods, wares and merchandise, then and there in the hands of said bankrupt, by the said Sheriff of Tazewell County, Illinois, under or by virtue of the said execution issued into the hands of the said sheriff on the 24th day of November A. D. 1907 out of the County Court of Peoria County Illinois for the sum of Two Hundred Eighty-two and 25/100 ($282.25) Dollars and Four ($4.00) Dollars costs of suit upon the said judgment confessed on the 13th day (?) (23rd) day of November A. D. 1907 in said Court by the bankrupt in favor of said D. M. Sechler Carriage Company (a corporation) another of the alleged creditors of the said bankrupt;

And that, the right, power and authority then and there vested and existing in this defendant, on the said 25th day of November A. D. 1907, over the said goods, wares and merchandise then and there in the possession of the said bankrupt, was, under and by virtue of the terms and provisions of the aforesaid conditional sales contracts, valid and enforcible rights accruing and belonging to this de-

[*In red ink in copy.]

fendant and that the same when then and there exercised were then and there superior to the rights, claims and demands of all other persons and that immediately upon and after this defendant had then and there seized upon and reduced said goods into its own possession, it from that time until now had, and still now has, good and lawful right and title to the same, as of its own property;

That said pretended order of subrogation, made and entered on the 21st day of January A. D. 1908, pretending to subrogate said Trustee to the rights and liens then assumed to belong to said
45 Peoria Cordage Company and to said D. M. Sechler Carriage Company, was illegal and void for want of jurisdiction and power in said Referee to make the said order and the same was illegal and void and of no effect and did not vest in said Trustee by way of subrogation any right, title or interest whatsoever in or to any part or parcel of the aforesaid goods, wares or merchandise; that no notice of ant kind was at any time given or served upon this defendant said*
prior to the ^ order of subrogation being applied for before said Referee and this defendant was not given any notice or opportunity to be present or to be heard concerning its interests, at the time said order of subrogation was applied for as aforesaid and that said order of subrogation was never at any time and is not now binding against or of any legal effect against this defendant;

That long prior to said order of subrogation, to-wit, 29th day of November, A. D. 1907 the said Sheriff by order of the attorney for said Peoria Cordage Company endorsed and returned the said Peoria Cordage Company execution and said execution was thereafter on the 5th day of December 1907 filed back in the said County Court of Peoria County Illinois from which the same was issued; that neither the said execution nor the said judgment was a valid *lein* in any event against the said goods, wares and merchandise of the bankrupt on the said 21st day of January A. D. 1908 when the said pretended order of subrogation was made and entered;

That until the filing of his certain amendment to his said bill of complaint herein, on, to-wit, the 16th day of April A. D. 1908, the complainant did not set up against this defendant in this proceeding any rights alleged to have been obtained by said complainant under or by virtue of said pretended order of said Referee pretending to subrogate said complainant as Trustee to any rights against this defendant belonging to said Peoria Cordage Company and said D. M. Sechler Carriage Company; but, that long prior to the date of the filing of said amendment herein by said complainant, as aforesaid, the said Sheriff of Tazewell County, Illinois, hod on, to-wit, the 21st day of February A. D. 1908 endorsed and returned the said D. M. Sechler Carriage Company execution "no property found" and the same had on the 22nd day of February A. D. 1908 been filed in the said County Court of Peoria County Illinois from whence it had been issued; and that, when the complainant filed herein his said amendment to his said bill of complaint as aforesaid, the said

[*In red ink in copy.]

D. M. Sechler Carriage Company execution and all rights,
46 if any, arising under it from the date of its issue, had long prior thereto, to-wit, on said 22nd day of February A. D. 1908, become null and void and of no legal force or effect.

All which matters and things this defendant avers to be true and pleads the same to the whole of the said bill of complaint and demands the judgment of this honorable court whether it, this defendant, ought to be compelled to make any answer to the said bill of complaint; and prays to be hence dismissed with its reasonable solicitor's fees and costs in this behalf most wrongfully sustained.

ROCK ISLAND PLOW COMPANY
(*Defendant*),
By WALTER H. KIRK,
CONNELLY & CONNELLY,
Its Solicitors.

WALTER H. KIRK,
CONNELLY & CONNELLY,
Solicitors for Rock Island Plow Company, Defendant.

In the District Court of the United States, Southern District of Illinois, Northern Division, at Peoria.

In Bankruptcy.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
ROCK ISLAND PLOW COMPANY (a Corporation).

Certificate of Counsel.

I, Walter H. Kirk, Counsel and one of the solicitors for Rock Island Plow Company, defendant, in the above entitled cause, do hereby certify that in my opinion the above and foregoing plea is well founded in point of law.

Peoria, Illinois, April 20, 1908.

WALTER H. KIRK,
Counsel and Solicitor for Rock Island Plow Company, Defendant.

47 *Affidavit of Walter H. Kirk.*

STATE OF ILLINOIS,
County of Peoria, ss:

Walter H. Kirk, being first duly sworn on his oath, says that he is one of the solicitors for Rock Island Plow Company, defendant, in the above entitled cause and that affiant knows the contents of the above and foregoing plea and that the matters and things therein contained are true in point of fact and that the same is not interposed for delay.

Peoria, Illinois, April 20, 1908.

WALTER H. KIRK.

Subscribed and sworn to before me this 20th day of April A. D. 1908.

AUSTIN F. JOHNSON,
Notary Public.

[NOTARIAL SEAL.]

Affidavit of Phil Mitchell.

In the District Court of the United States, Southern District of Illinois, Northern Division, at Peoria.

In Bankruptcy.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
ROCK ISLAND PLOW COMPANY (a Corporation).

Affidavit.

STATE OF ILLINOIS,
County of Rock Island, ss:

Phil Mitchell of Rock Island, Illinois being first duly sworn on his oath says that he is President of Rock Island Plow Company (a corporation) defendant, in the above entitled cause and that he has read and heard read the above and foregoing plea and that the same is not interposed for delay.

PHIL MITCHELL.

48 Subscribed and sworn to before me this 20th day of April A. D. 1908.

EDWARD B. KREIS,
Notary Public.

[NOTARIAL SEAL.]

Endorsed:—No. 148. In the District Court of the United States, Southern District of Illinois, Northern Division at Peoria. W. J. Reardon, Trustee in Bankruptcy of Frank Brown, Bankrupt, vs. Rock Island Plow Company (a corporation). Plea of Rock Island Plow Company defendant to bill of complaint of W. J. Reardon, Trustee in Bankruptcy of Frank Brown, Complainant. Filed Apr. 21 1908. R. C. Brown, Clerk.

And afterwards, to-wit on the fourth day of May in the year of our Lord one thousand nine hundred and eight the following further proceedings were had in said Court in said Cause and were entered of record as follows to-wit:

In the District Court of the United States, Southern District of Illinois, Northern Division.

In Equity.

Monday, May 4th, A. D. 1908.

Present: The Honorable J. Otis Humphrey, Judge.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
ROCK ISLAND PLOW COMPANY, a Corporation.

Decree.

This cause having been set down for hearing before the court to determine the sufficiency of the plea filed herein by the defendant, Rock Island Plow Company, and the court having considered said plea and heard the arguments of counsel and being fully advised in the premises doth

Order, Adjudge and Decree that said plea be taken and
49 considered as sufficient to which order of the court the complainant by his solicitors excepts.

And thereupon the complainant elects to file no reply to the said plea and it is therefore Ordered by the court that the bill of complaint filed herein by the said complainant, W. J. Reardon, trustee in bankruptcy of Frank Brown, bankrupt be and the same is hereby dismissed.

And it is further Ordered by the court that the complainant pay the costs of this suit in due course of administration of said estate in bankruptcy.

To the entry of said order dismissing said bill of complaint the complainant by his solicitor excepts.

And thereupon on the eleventh day of May in the year of our Lord one thousand nine hundred and eight the complainant by Covey & Covey his solicitors filed in the office of the Clerk of said Court, his Petition for Appeal, which said petition is as follows, to-wit:

In the District Court of the United States, Southern District of Illinois, Northern Division.

In Equity.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
ROCK ISLAND PLOW COMPANY, a Corporation.

Petition for Appeal.

Filed May 11, 1908.

The above named complainant deeming himself aggrieved by the decree made and entered in the above entitled cause on the 4th day of May, A. D. 1908 holding that the plea filed by the defendant is sufficient and dismissing the complainant's bill, hereby appeals from said order and decree to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the assignment of errors filed herewith and *be* prays that this appeal may be allowed and tthat a transcript of the record, proceedings and papers from which said order was made, duly authenticated, may be sent
50 to the United States Circuit Court of Appeals for the Seventh Circuit.

COVEY & COVEY,
Solicitors for Complainant.

Endorsed:—# 148. In the U. S. District Court, Southern District of Illinois. W. J. Reardon, Trustee, vs. Rock Island Plow Co. Petition for Appeal. Filed May 11 1908 at 10.30 o'clock A. M. R. C. Brown, Clerk.

And said Complainant came again on the same day and filed in the Clerk's office of said Court his Assignment of Errors, which said Assignment of Errors is as follows, to-wit:

In the District Court of the United States, Southern District of Illinois, Northern Division.

In Equity.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
ROCK ISLAND PLOW COMPANY, a Corporation.

Assignment of Errors.

Filed May 11, 1908.

Now comes the complainant and files the following assignment of errors upon which he relies in his appeal from the decree by this

honorable court entered on the 11th day of May, A. D. 1908, in the above entitled cause.

1. The court erred in holding the plea filed by the defendant to be sufficient for the following reasons:

a. Said plea is not sworn to by the defendant as is provided by Equity Rule 31.

b. That by the order set up in the complainant's bill of complaint the complainant was subrogated to the rights of the Peoria Cordage Company and D. M. Sechler Carriage Company execution creditors of the bankrupt Frank Brown and as against the trustee standing in the position of an execution creditor the defendant had
51 no right to take possession of the goods mentioned in said bill of complaint and in said plea.

2. The court erred in holding that the defendant had not received a preference under the facts set forth in the defendant's plea.

3. The court erred in dismissing the complainant's bill of complaint.

4. The court erred in holding and decreeing that the plea filed by the defendant is sufficient.

By reason whereof the complainant prays that said decree may be reversed.

COVEY & COVEY,
Solicitors for the Complainant.

Endorsed:—# 148. In the U. S. District Court, Southern District of Illinois. W. J. Reardon, Trustee, vs. Rock Island Plow Co. Assignment of Errors. Filed May 11 1908 at 10.30 o'clock A. M. R. C. Brown, Clerk.

And afterwards to-wit, on the same day the further following proceedings were had in said Court in said Cause and were entered of record as follows, to-wit:

In the District Court of the United States, Southern District of Illinois, Northern Division.

Monday, May 11th, A. D. 1908.
Present: The Honorable J. Otis Humphrey, Judge.

—. In Equity.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
ROCK ISLAND PLOW COMPANY, a Corporation.

Order of May 11, 1908.

Now comes the complainant by Covey & Covey, his solicitors, and files his petition for appeal to the Circuit Court of Appeals of the

United States for the Seventh Circuit together with his assignment of errors, it is therefore

Ordered by the court that said appeal be and the same is
52 hereby allowed to the Circuit Court of Appeals for the Seventh Circuit and that a transcript of the record herein be transmitted to the clerk of said court of appeals within thirty days from the entry of this order.

In the District Court of the United States for the Southern District of Illinois, Northern Division.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Bankrupt,
vs.
ROCK ISLAND PLOW COMPANY (a Corporation).

Præcipe for Record.

Filed May 11, 1908.

To the Clerk of said Court:

On making up the record to be transmitted to the Circuit Court of Appeals in the above entitled cause, you will please embody therein, the following:

Bill of Complaint,
Chancery Subpœna,
Entry of Appearance of Defendant's solicitors,
Defendant's plea to Original Bill,
Order for leave to amend bill,
Amendment to Bill,
Defendant's plea to amended bill,
Order sustaining plea to amended bill, etc.,
Petition for Appeal,
Assignment of Errors,
Order allowing appeal,
Citation.

COVEY & COVEY,
Solicitors for Complainant.

Endorsed: Filed May 11 1908. R. C. Brown, Clerk.

53 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of Illinois, Northern Division, ss:

I, R. C. Brown, Clerk of the District Court of the United States for the Southern District of Illinois, do hereby certify the foregoing to be a true and correct copy of all the papers filed and proceedings thereon had, as required by the præcipe filed in a certain cause wherein W. J. Reardon, Trustee in Bankruptcy of Frank Brown,

bankrupt is complainant and Rock Island Plow Company, a corporation is defendant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Peoria, in said division and district, this 20th day of May in the year of our Lord one thousand nine hundred and eight.

R. C. BROWN, *Clerk.*
J. T. B. JONES,
Chief Deputy.

[SEAL.]

54 *Citation.*

Citation Filed May 11, 1908.

The President of the United States to the Rock Island Plow Company (a corporation) Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Seventh Circuit to be holden at Chicago within thirty days from the date hereof pursuant to an order allowing an appeal filed in the clerk's office of the District Court of the United States for the Southern District of Illinois, Northern Division, wherein W. J. Reardon, Trustee in bankruptcy of Frank Brown, bankrupt, is appellant and the Rock Island Plow Company, a corporation, is appellee, to show cause if any there be, why the decree rendered against the appellant in said cause should not be corrected and why speedy justice should not be done in that behalf.

Witness the Honorable J. Otis Humphrey, Judge of the District Court of the United States for the Southern District of Illinois, this 11th day of May, in the year of our Lord, 1908.

J. O. HUMPHREY,
United States District Judge.

PEORIA, *May* 11, 1908.

Received of Covey & Covey, Solicitors for Appellant, a copy of the above Citation and waive service of Citation by Marshal*l*.

ROCK ISLAND PLOW COMPANY,
By CONNOLLY & CONNOLLY AND
WALTER H. KIRK,
Solicitors for Appellee.

Endorsed: In the U. S. District Court, Southern District of Illinois. W. J. Reardon, Trustee, vs. Rock Island Plow Company. Citation. Filed May 11, 1908. R. C. Brown, Clerk.

55 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the fore-

going printed pages, numbered from 1 to 54, inclusive, contain a true copy of the transcript of the record of the District Court of the United States for the Southern District of Illinois, Northern Division, and that I have carefully compared the same with the original transcript of the record filed in the case of W. J. Reardon, Trustee in Bankruptcy of Frank Brown, vs. Rock Island Plow Company No. 1501, October Term, 1908, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 4th day of February, A. D. 1909.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

56 At a Regular Term of the United States Circuit Court of Appeals, Begun and Held at the United States Court Rooms, in the City of Chicago, in said Seventh Circuit, on the First Day of October, A. D. Nineteen Hundred and Seven, of the October Term, in the Year of Our Lord, One Thousand Nine Hundred and Seven, and of Our Independence the One Hundred and Thirty-second.

And afterwards, to-wit: On the 29th day of May, 1908, in the October Term last aforesaid, came the appellant by his counsel and filed in the office of the Clerk of this court his appearance, which is in words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1907.

No. 1501.

W. J. REARDON, etc.,
v.
ROCK ISLAND PLOW COMPANY.

The Clerk will enter my appearance as counsel for the appellant.
IRA J. COVEY.

Endorsed: Filed May 29th, 1908. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the same day, in the October term last aforesaid, came the appellee by its counsel and filed in the office of the Clerk of this court *their* appearances, which are in words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1907.

No. 1501.

In re REARDON, Trustee, Appellant,
v.
R. I. PLOW CO., Appellee.

57 The Clerk will enter *my* appearance as counsel for the appellee.

WALTER H. KIRK,
Peoria, Ill.
H. C. CONNELLY,
B. D. CONNELLY,
Rock Island, Ill.

Endorsed: Filed May 29th, 1908. Edward M. Holloway, Clerk.

And afterwards, on the same day, in the October term last aforesaid, came the appellee by its counsel and filed in the office of the Clerk of this court *his* appearance, which is in words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1907.

No. 1501.

In re REARDON, Trustee, Appellant,
v.
R. I. PLOW CO., Appellee.

The Clerk will enter my appearance as counsel for appellee.
B. D. CONNELLY.

Endorsed: Filed May 29th, 1908. Edward M. Holloway, Clerk.

And afterwards, on the 11th day of August, 1908, in the October term last aforesaid, there was filed in the office of the Clerk of this court a certain certificate, which certificate is in words and figures following, to-wit:

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Appellant,
vs.
ROCK ISLAND PLOW COMPANY, Appellee.

UNITED STATES OF AMERICA,
Southern District of Illinois, Northern Division, ss:

58 I, R. C. Brown, Clerk of the District Court of the United States for the Southern District of Illinois, do hereby certify that I have carefully compared the printed Transcript of

Record with the original files, in the above entitled cause, and find the following mistakes or omissions, to-wit:

Page 35, Line 16. Date of filing of Defendant's plea which is printed "1906" should be "1908."

Page 43, Line 8. In the printed record now reads, "of the proceedings, and that the defendant then and there" should read, "of the proceedings, and that the defendant then and there lawfully"—The word "lawfully" having been omitted.

Page 43, Line 33. In the printed record now reads, "Bankrupt, the defendant was then and there a creditor of the" should read, "Bankrupt, the defendant was not then and there a creditor of the"—The word "not" having been omitted.

Page 43, Line 8. In the printed record now reads, "-fendant prior to the order of subrogation being applied" should read "-fendant prior to the said order of subrogation being applied"—The word "said" having been omitted.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Peoria, in said District and Division, this 10th day of August, A. D. 1908.

[SEAL.]

R. C. BROWN, *Clerk.*
J. T. B. JONES, *Deputy.*

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court Rooms, in the City of Chicago, in said Seventh Circuit, on the Sixth Day of October, A. D. Nineteen Hundred and Eight, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Eight, and of Our Independence the One Hundred and Thirty-third.

And afterwards, to-wit: On the sixth day of October, 1908, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *October* 6, 1908.

59 Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

No. 1501.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown,
v.
ROCK ISLAND PLOW COMPANY.

Appeal from the District Court of the United States for the Southern District of Illinois.

It is ordered by the Court that this cause be, and the same is, hereby set down for hearing on October 8th, 1908.

And afterwards, to-wit: On the eighth day of October, 1908, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

THURSDAY, *October* 8, 1908.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

No. 1501.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown,
v.
ROCK ISLAND PLOW COMPANY.

Appeal from the District Court of the United States for the Southern District of Illinois.

Now this day come the parties by their counsel and this cause comes on now to be heard on the printed record and briefs of
60 counsel and on oral argument by Mr. Ira J. Covey, counsel for appellant and by Mr. Walter H. Kirk and Mr. B. D. Connelly, counsel for appellee, and the court having heard the same, takes this matter under advisement.

Afterwards, to-wit: On the fifth day of January, 1909, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *January* 5, 1909.

The Court met pursuant to adjournment and was opened by proclamation of the crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

No. 1501.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown,
v.
ROCK ISLAND PLOW COMPANY.

Appeal from the District Court of the United States for the Southern District of Illinois.

This cause came on to be heard on the Transcript of the Record in the District Court of the United States for the Southern District of Illinois and was argued by counsel, on consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said District Court with direction to overrule the plea and proceed further in accord with the opinion of this Court.

61 And afterwards, to-wit: On the fifth day of January, 1909, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court an opinion, which said opinion is in the following words and figures, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term and Session, A. D. 1908.

No. 1501.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Appellant,
v.
ROCK ISLAND PLOW COMPANY.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

Before Grosscup, Baker, and Seaman, Circuit Judges.

The appellant, as trustee of the estate of Frank Brown, a bankrupt, filed his bill in the District Court—and later an amended bill on leave of the court—against the appellee, Rock Island Company, for accounting and recovery for personal property obtained by the

appellee from the bankrupt, two days prior to the bankruptcy adjudication, in alleged derogation of rights thereto now vested in such trustee; and this appeal is from a decree dismissing the bill, as amended, on the hearing of a plea interposed by the appellee and sustained by the trial court, the appellant electing "to file no reply to the said plea."

The facts averred in the bill are (in substance), that on November 27, 1907, Frank Brown filed his voluntary petition in bankruptcy in the trial court, and on the same day was adjudged a bankrupt; that the complainant (appellant) was elected and is acting as trustee of the estate therein; that on November 25, 1907, the bankrupt, for a preëxisting indebtedness of $406, transferred to the Rock Island Plow Company property in payment thereof valued at $500; that the bankrupt was then insolvent, and such company then had notice and reasonable cause to believe him to be insolvent; and that such transfer was an unlawful preference of that company,
62 as a creditor, over other creditors of the bankrupt of the same class. In the amended bill two executions are averred as issued and in the hands of the sheriff of Tazewell County in favor of judgment creditors of the bankrupt—one in favor of Peoria Cordage Company, for $247.15, delivered to the sheriff November 13, 1907, and the other in favor of D. M. Sechler Carriage Company, for $282.25, delivered November 24, 1907—each of which was wholly unsatisfied, and therefore alleged to constitute a lien upon all real and personal property of the bankrupt on and after delivery to the sheriff; and proceedings in bankruptcy are further averred setting aside the liens so obtained as to the execution creditors, but preserving them for the benefit of the estate in bankruptcy, with the trustee subrogated therein.

The plea of the appellee, Rock Island Plow Company, which was sustained by the trial court, avers (substantially) in justification of such taking of property from the bankrupt that the property was obtained from the appellee and held by the bankrupt exclusively under the terms and conditions of three written contracts, signed by the bankrupt in the name of his then copartnership, dated respectively, (1) December 15, 1905, (2-3) March 7, 1903, whereof copies are annexed to the plea; and the following terms contained in each are set forth as the conditions relied upon, viz.:

"It is agreed that the delivery of all goods sold, and the time of payment granted to purchaser by terms of this contract, are in reliance upon the credit standing and prospects of business of purchaser as now engaged, communicated direct or through usual commercial channels, and that if the status of the purchaser be not as communicated, or if it be changed hereafter before full payment by mortgage, loss by fire, sale out of usual course of trade, dissolution, assignment, bankruptcy, attachment or the like then any and all of such indebtedness shall be at our election, without notice, immediately due, or we may treat the same, whether in notes or on account as if the original purchases had been contracted for cash on delivery.

"It is agreed that the right to the possession of all goods ordered or described generally or specifically in this contract or which may

be ordered and shipped to purchaser hereafter during the life of this contract as herein provided, and the proceeds (in case of sale of same) shall remain in and inure to us, with the effect that
63 we may hold or retake and subject same as security (in the manner described by law for the subjection of chattels and foreclosure of chattel liens of like nature) to the indebtedness hereby contracted until full payment shall have been made by purchaser to our acceptance; and to this end the moneys and notes received on such sales shall be kept separate and apart from other moneys, papers and transactions, but nothing in this shall release purchaser from making payment as stipulated in this contract."

And it is further averred: that the goods mentioned remained at all times the property of the appellee, until paid for by the bankrupt; that he had not paid the purchase price therefor on November 25, 1907; that the appellee then "lawfully retook and repossessed itself of the same;" and that it was not therein "a creditor of said bankrupt within the meaning of the" Bankrupt Act. The plea also states, that no levy was made by the sheriff upon any of these goods; that the alleged order of subrogation in favor of the trustee "was illegal and void," and made without notice to the appellee; that theretofore, on November 29, one of said executions was "endorsed and returned" by the sheriff and "filed back" in the County Court December 3, 1907, and on February 21, 1908, the other of said executions was returned by the sheriff, endorsed "no property found."

SEAMAN, *Circuit Judge,* delivered the opinion of the court:

The sufficiency of the bill and amended bill filed by the appellant, as trustee in bankruptcy, to charge the appellee with accountability for receiving a preference within the terms of the Bankruptcy Act, is unquestioned; and the only issue for review is, whether the facts set up in the appellee's plea are sufficient to avoid such charge, as the trial court ruled thereupon. That the contracts and defaults averred in the plea justified the taking or retaking of the property in question, as between the appellee and the bankrupt, may not be doubted. Under the provisions of the Bankruptcy Act, however, the facts averred in the bill and admitted by the plea, raise a different question, as to the import and force of such contracts in reference to the rights set up by the trustee; and we are impressed with no theory of the contract conditions on which the plea can be upheld.

The contentions on behalf of the appellee, in support of the plea, rest upon the premise, that these contracts were condi-
64 tional-sale contracts—not chattel mortgages or liens upon personal property, within the provisions of Section 1 of the Chattel Mortgage Act of Illinois, 2 Starr & Curtis Ann. St. (2 ed.) 2743—and so recognized as valid under authorities cited. On the other hand, the twofold contentions for the appellant are, (1) that no conditional sale appears, for want of contract terms retaining title in the seller, so that the several contracts are without force as liens under the Illinois Act above mentioned, and (2) that, treated as conditional sale contracts, they furnish no defense against the right

of action vested in this trustee, through the paramount liens of execution creditors, under the established rule in Illinois in reference to such contracts. So, it is not claimed on the part of the appellee, that its taking of the property in controversy can be upheld by way of the enforcement of a lien thereon in any form; and it clearly appears from the above cited statutory provision in Illinois and the decisions thereunder that the contracts furnish no support for a lien to bar recovery under the bill.

The contract terms or conditions set out in the plea and relied upon in the argument for the interpretation sought as a conditional sale, make no express provision in reference to the title—neither for retaining it in the seller nor for its transfer to the purchaser on delivery, although the parties are so named therein—and no direct provision for title to the property delivered to the purchaser appears elsewhere in the contracts exhibited with the plea. Each contract is in the twofold form of an order (by the purchaser) for the goods specified, and an invoice (by the seller) stating prices and terms of payment, which plainly intends delivery to the purchaser for unrestricted sale, on his own account, in the usual course of business, subject only to the express terms referred to. While those terms distinctly provide, not only that delivery is made "in reliance upon the credit standing and business prospects of the purchaser," with "indebtedness" for purchase money immediately due, at the seller's election, for causes stated, but that "right to the possession of all goods" and proceeds of sale "shall remain in and inure to" the seller, "with the effect" that the seller "may hold or retake and subject same as security in the manner described by law" for "the indebtedness hereby contracted," we are not satisfied that terms appear under which the contract can rightly be interpreted as one of
65 conditional sale, within the authorities, and thus distinguished from a contract of sale with apt terms reserving a purchase money lien. In view, however, of the conceded averments of the fact in reference to liens preserved in favor of the estate under prior executions, we are of opinion, that the contracts and possession taken thereunder are equally without force to defeat recovery under the bill, whether the sale be interpreted as conditional or otherwise; and so proceed to considerations of such facts, on the assumption that conditional-sale contracts appear, without determining the actual character of the contracts.

The Bankruptcy Act provides (Section 67 *b c f*) for the preservation of liens in favor of the estate, when obtained by any creditor of the bankrupt, through legal proceedings or otherwise and set aside in bankruptcy, with the trustee subrogated therein for their enforcement; and the effect of this provision, in reference to an order in bankruptcy so preserving a lien obtained in legal proceedings, is not open to question—First National Bank v. Staake, 202 U. S., 141, 146, 148—as rendering it inoperative as a preference, while the statute recognizes its force otherwise, but "distributes the lien among the whole body of the creditors," in conformity with the policy of the Act. The executions described in the bill were issued in favor of judgment creditors of the bankrupt and in the hands of the sheriff for levy;

and when bankruptcy intervened, liens being claimed, the court made this statutory order, on notice to the claimants—the only notice, as we believe, intended by the provision—so that the trustee became subrogated to any lien obtained by such creditors, as of the date of the adjudication of bankruptcy.

With the trustee thus entitled to the benefits of the executions, the remaining inquiries are: (1) Whether a lien was obtained upon personal property in the hands of the bankrupt, upon delivery of the executions to the sheriff; and (2) if so, whether such lien is applicable to property held by him under a contract of conditional sale. As the law of Illinois must govern the answer to both questions, and the rule there is well settled, as we believe, for an affirmative answer to each, no difficulty appears in the solution. Section 9 of chapter 77 R. S. (2 Starr & Curtis Ann. St. 2nd ed. p. 2336) provides: "No execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the sheriff or other
66 proper officer to be executed." This is a modification of the rule at common law which created a lien from the issuance of the writ, and its effect to create a lien in favor of the execution creditor is recognized in numerous decisions noted in Starr & Curtis, supra. See Frink v. Pratt & Co., 130 Ill., 327, 331, one of the citations in appellee's brief. The cases cited contra, declaratory of the rule, that an officer receiving the execution has "no interest in the property itself" to maintain an action therefor "until after a levy," do not touch the present inquiry of lien in favor of the execution creditor, and are plainly inapplicable. Upon the second question, it is stated in Gilbert v. Nat. Cash Register Co., 176 Ill., 288, 296, that "whatever may be the rule in other jurisdictions," this rule is established in Illinois: "If a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee so as to clothe him with an apparent ownership, a bona fide purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor." The authorities there cited for such rule are deemed sufficient reference; and we remark that no departure appears from the doctrine thus stated in any of the Illinois cases called to our attention.

The decree of the District Court is reversed, therefore, with direction to overrule the plea and proceed further in accord with this opinion.

A true Copy.
Teste:

_____,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

67 And afterwards, to-wit: On the third day of February, 1909, there was filed in the office of the Clerk of this Court a motion for stay of mandate, which motion is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1908.

No. 1501.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Appellant,
v.
ROCK ISLAND PLOW COMPANY, Appellee.

Motion.

Comes now Rock Island Plow Company, appellee, by Connelly & Connelly, its solicitors, and moves the Court to stay the mandate herein until the further order of this Court, and for grounds of such motion, states:

That the amount in controversy does not exceed the sum of two thousand dollars; that appellee desires to pray and perfect an appeal to the Supreme Court of the United States, and that in order to perfect such appeal it is necessary for some Justice of the Supreme Court of the United States to certify that in his opinion the determination of the question or questions involved herein is essential to a uniform construction of the bankruptcy Act throughout the United States.

CONNELLY & CONNELLY,
Solicitors for Appellee.

Endorsed: Filed February 3, 1909. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the same day in the October Term last mentioned, the following further proceedings were had and entered of record, to-wit:

68 WEDNESDAY, *February* 3, 1909.

Court met pursuant to adjournment and was opened by proclamation of the crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

No. 1501.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown,
v.
ROCK ISLAND PLOW COMPANY.

Appeal from the District Court of the United States for the Southern District of Illinois.

On motion of counsel for appellee, it is ordered that the mandate in this cause be and the same is hereby stayed until February 11th, 1909.

And afterwards, to-wit: On the fourth day of February, 1909, in the October Term last aforesaid, there was filed in the office of the Clerk of this court a petition for appeal and assignment of errors, which are in words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1908.

No. 1501.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Appellant,
vs.
ROCK ISLAND PLOW COMPANY, Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

The above named appellee, deeming itself aggrieved by the decree made and entered in the above entitled cause on the 5th day of January, A. D. 1909, reversing the decree of the District
69 Court of the United States for the Southern District of Illinois, Northern Division, hereby appeals from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record proceedings and papers from which said order was made, to wit: all the pleadings, the decree of said court, the finding of facts and the conclusions of law, all duly authenticated, may be sent to the Supreme Court of the United States.

ROCK ISLAND PLOW COMPANY,
By CONNELLY & CONNELLY,
Solicitors for Appellee.

Endorsed: Filed February 4, 1909. Edward M. Holloway, Clerk.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1908.

No. 1501.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Appellant,
v.
ROCK ISLAND PLOW COMPANY, Appellee.

Appeal From the District Court of the United States for the Southern District of Illinois, Northern Division.

Assignment of Errors.

Now comes the appellee and files the following assignment of errors upon which it relies in its appeal from the decree by this Honorable Court, entered on the 5th day of January, A. D. 1909, in the above entitled cause:

1. The Court erred, in holding that the plea of appellee was insufficient, for the following reasons:

First. The Court erred in holding that the contracts set up and relied upon in the plea of appellee were not conditional sale contracts.

Second. The Court erred in holding that appellee was not entitiled by virtue of said contracts to the possession of the
70 goods retaken thereunder, as against the Trustee in Bankruptcy.

Third. The Court erred in not holding that the rights of appellee under said contracts were superior to the rights of said Trustee in Bankruptcy.

Fourth. The Court erred in holding that said Trustee in Bankruptcy was subrogated to the rights of Peoria Cordage Company, execution creditor, when no levy upon any of said property had been made under said execution.

Fifth. The Court erred in holding that said Trustee in Bankruptcy was subrogated to the rights of D. M. Sechler Carriage Company, execution creditor, when no levy upon any of said property had been made under said execution.

Sixth. The Court erred in holding that appellant, as Trustee, was subrogated to the rights of said execution creditors without due notice by appellee of the motion for the entry of such order of subrogation, nor of the hearing thereon, nor of the entry of said order.

Seventh. The Court erred in holding that appellee had received a preference under the facts set forth in appellee's plea.

Eighth. The Court erred in holding that the bill filed by the appellant, as Trustee in Bankruptcy, was sufficient to charge the appellee with accountability for receiving a preference within the terms of the Bankruptcy Act, as against the averments of the plea and the contracts therein relied upon by appellee.

2. The Court erred in reversing the decree of the District Court

of the United States for the Southern District of Illinois, Northern Division, holding the plea of appellee to be sufficient and dismissing said bill of complaint, for all the reasons hereinabove specified in Paragraph No. 1.

3. The Court erred in not affirming the decree of the District Court of the United States for the Southern District of Illinois, Northern Division.

ROCK ISLAND PLOW COMPANY,
By CONNELLY & CONNELLY,
Its Solicitors.

Endorsed: Filed February 4, 1909. Edward M. Holloway, Clerk

71 And afterwards, to-wit: On the same day, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

THURSDAY, *February* 4, 1909.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

No. 1501.

W. J. REARDON, Trustee in Bankruptcy of Frank Brown, Appellant,
vs.
ROCK ISLAND PLOW COMPANY, Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

Now comes the appellee, by Connelly & Connelly, its solicitors, and files its petition for appeal to the Supreme Court of the United States, together with its assignment of errors.

It is, therefore, ordered by the court that said appeal be and the same hereby is allowed to the Supreme Court of the United States and that a transcript of the record herein be transmitted to the Clerk of the Supreme Court of the United States within thirty (30) days from the entry of this order, upon appellee filing herein a good and sufficient bond in the sum of Five hundred Dollars ($500.00). Said bond to be approved by the Clerk of this court.

Endorsed: Filed February 4, 1909. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the same day, in the October Term

last aforesaid, there was filed in the office of the Clerk of this court an appeal bond, which said bond is in words and figures
72 following, to-wit:

Know all men by these presents, That we, Rock Island Plow Company a corporation organized and existing under the laws of Illinois, as principal, and The United States Fidelity and Guaranty Company a corporation, as sureties, are held and firmly bound unto W. J. Reardon trustee in bankruptcy of the Estate of Frank Brown bankrupt in the full and just sum of five hundred — to be paid to the said W. J. Reardon trustee attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 4th day of February in the year of our Lord one thousand nine hundred and Nine.

Whereas, lately at a session of the Circuit Court of Appeals of the United States, in a suit pending in said Court, between W. J. Reardon trustee appellant and Rock Island Plow Company, a decree was rendered against the said Rock Island Plow Company and the said Rock Island Plow Company having obtained from said Court an order allowing an appeal to the United States Supreme Court and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree of the aforesaid suit, and a citation directed to the said W. J. Reardon trustee, citing and admonishing him to be and appear at the United States Supreme Court, to be holden at Washington, D. C.

Now the condition of the above obligation is such, That if the said Rock Island Plow Company shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of

ROCK ISLAND PLOW COMPANY, [SEAL.]
By B. D. CONNELLY, *Its Att'y-in-Fact.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By F. A. HANCOCK, *Attorney-in-Fact.*

Approved by:
EDWARD M. HOLLOWAY.

Endorsed: Filed Feb. 4, 1909. Edward M. Holloway, Clerk.

73 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 17, inclusive, contain

a true copy of the proceedings had and papers filed (except briefs of counsel) in the case of W. J. Reardon, Trustee in Bankruptcy of Frank Brown vs. Rock Island Plow Company. No. 1501, October Term, 1908, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 4th day of February A. D. 1909.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

74 UNITED STATES OF AMERICA, *ss:*

To W. J. Reardon, Trustee in Bankruptcy of the Estate of Frank Brown, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a- order for an appeal, filed in the Clerk's Office of the Circuit Court of Appeals of the United States for the Seventh Circuit wherein Rock Island Plow Company is appellant and W. J. Reardon, trustee in bankruptcy of the Estate of Frank Brown, bankrupt, is appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Peter S. Grosscup, presiding judge of the Circuit Court of Appeals for the 7th Circuit this fourth day of February, in the year of our Lord one thousand nine hundred and nine.

P. S. GROSSCUP, *Judge.*

75 On this 6th day of February, in the year of our Lord one thousand nine hundred nine, personally appeared Geo. A. Shurtleff before me, the subscriber, at my office at Peoria, Illinois, and makes oath that he delivered a true copy of the within citation to W. J. Reardon trustee in bankruptcy of the estate of Frank Brown, bankrupt, on February 6th, 1909.

GEO. A. SHURTLEFF.

Sworn to and subscribed the 6th day of February A. D. 1909.

[SEAL.] HENRY MANSFIELD,
Notary Public.

Received copy of within notice this 6th day of February A. D. 1909.

W. J. REARDON, *Trustee.*

[Endorsed:] 536/21762. No. —. Supreme Court of the United States. Rock Island Plow Co. vs. W. J. Reardon Trustee in bankruptcy of the estate of Frank Brown bankrupt. Citation to the Supreme Court of the United States.

Endorsed on cover: File No. 21,762. U. S. Circuit Court Appeals, 7th Circuit. Term No. 98. Rock Island Plow Company, appellant, vs. W. J. Reardon, trustee in bankruptcy of Frank Brown, bankrupt. Filed July 20th, 1909. File No. 21,762.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 98.

ROCK ISLAND FLOW COMPANY, APPELLANT,

vs.

W. J. REARDON, TRUSTEE IN BANKRUPTCY OF FRANK BROWN, BANKRUPT.

BRIEF FOR APPELLANT.

W. H. SHOLES,
Solicitor for Appellant.

WALTER H. KIRK,
CONNELLY & CONNELLY,
Of Counsel for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 98.

ROCK ISLAND PLOW COMPANY, APPELLANT,

vs.

W. J. REARDON, TRUSTEE IN BANKRUPTCY OF FRANK BROWN, BANKRUPT.

BRIEF FOR APPELLANT.

Statement of Case.

This suit was commenced by W. J. Reardon, trustee in bankruptcy of Frank Brown, against the Rock Island Plow Company, of Rock Island, Illinois, in the district court of the United States, alleging that the appellee had been appointed trustee in bankruptcy for Frank Brown, on the 27th day of November, 1907; and further alleging that on the 25th day of November, 1907, the said bankrupt, being indebted to the Plow Company, delivered to the appellant certain merchandise of the value of $500, in full payment and discharge of a previously existing indebtedness of $406, and further alleging that at the time of said delivery the said Frank Brown was insolvent, and that the appellant then had reasonable cause to believe the said bankrupt was insolvent, and further alleging that the transfer of said

merchandise was in violation of the rights and interests of other creditors of said bankrupt, and in violation of the provisions of the act of Congress relating to bankruptcy, and amounted to an unlawful preference of said Plow Company over other creditors, and prayed that the amount of the said property transferred by the said bankrupt to the Plow Company in payment of said pre-existing indebtedness be ascertained, and that the defendant be decreed to return the said property to the complainant, or the value thereof.

To this bill the appellant filed its plea stating, among other things, that the goods which were delivered by the bankrupt to the defendant two days prior to the adjudication in bankruptcy, were goods which had been conditionally sold by the Plow Company to the bankrupt under the terms of an agreement expressly reserving, among other things, the right to the possession in the vendor, the appellant, of all goods sold and delivered to the purchaser until the same were fully paid for, with the right to retake the same upon condition broken (Rec., pp. 6–8).

Upon the filing of the plea the appellee obtained leave to amend, and by his amendment, set up that on November 13, 1907, the Peoria Cordage Company, one of the creditors of the bankrupt, obtained judgment by confession against the bankrupt in the County Court of Peoria County, for the sum of $247.15, and that execution was issued on the same day, and said execution was duly received and endorsed by the sheriff of said county on the 14th day of November, alleging that the judgment thereby became a lien on all of the real and personal property of the said bankrupt located in said county. Further alleging that the D. M. Sechler Carriage Company, another creditor of the bankrupt, obtained judgment by confession on the 13th day of November, 1907, for $282.25, and that execution was issued on the

said judgment on the 23rd day of November, 1907, and that the same was duly received and endorsed by the sheriff of said county on the 24th day of November, 1907, and that both of said executions were in the hands of the sheriff unsatisfied at the time of the adjudication in bankruptcy (Rec., pp. 28–29). The amendment further recites that on January 21, 1908, upon the petition of the trustee, the referee in bankruptcy ordered that the liens obtained through the judgments of the said creditors be declared null and void as to said creditors, but that the liens of said judgments and executions be preserved for the benefit of said estate in bankruptcy (Rec., p. 31).

To this amendment the appellant interposed the further plea that the goods, which were subsequently delivered to the Plow Company, but which were in the possession of the bankrupt at the time of the issuing of the executions upon the said judgments, were in fact the property of the Rock Island Plow Company, and were not subject to levy or seizure by the sheriff under said executions, and the plea further set up the fact that no levy had ever been made on said goods, which were subsequently delivered to the appellant, and further that on the 29th day of November, 1907, the said sheriff, by order of the attorney for the Peoria Cordage Company, endorsed and returned the said execution, and the said execution was on the 5th day of December, 1907, a long time prior to the entry of the order of the referee of January 21, 1908, filed back to the said county court from which the same was issued, and that neither the said execution nor the said judgment was a valid lien in any event against the goods of the bankrupt when the said petition ordering the subrogation was made and entered. The plea further sets out that until the filing of the amendment to his bill, on April 16, 1908, the

trustee did not set up against this defendant in this proceeding any rights alleged to have been obtained by said complainant under or by virtue of said pretended order of said referee, and that long prior to the date of the filing of said amendment the sheriff of Taswell County had, on the 21st day of February, 1908, endorsed and returned the said D. M. Sechler Carriage Company's execution "no property found," and on the 22d day of February, 1908, the same had been duly filed back in said county court, and at the time of the amendment to the said bill the execution of the said carriage company was null and void and of no legal force or effect (Rec., pp. 32 to 36).

The case came on for hearing in the District Court and it was ordered that said bill be dismissed (Rec., p. 38), from which order the trustee appealed (Rec., p. 38).

Upon the hearing in the United States Circuit Court of Appeals for the Seventh Circuit the decree of the District Court was reversed and the case remanded with direction to overrule the plea (Rec., p. 47). From which decree the defendant, Rock Island Plow Company, appealed to this court.

Assignment of Errors.

1. The court erred in holding that the plea of appellant was insufficient, for the following reasons:

First. The court erred in holding that the contracts set up and relied upon in the plea of the appellant were not conditional sale contracts.

Second. The court erred in holding that the appellant was not entitled by virtue of said contracts to the possession of the goods retaken thereunder, as against the trustee in bankruptcy.

Third. The court erred in not holding that the rights

of appellant under said contracts were superior to the rights of said trustee in bankruptcy.

Fourth. The court erred in holding that said trustee in bankruptcy was subrogated to the rights of Peoria Cordage Company, execution creditor, when no levy upon said property had been made under said execution.

Fifth. The court erred in holding that said trustee in bankruptcy was subrogated to the rights of D. M. Sechler Carriage Company, execution creditor, when no levy upon said property had been made under said execution.

Sixth. The court erred in holding that appellee, as trustee, was subrogated to the rights of said execution creditors without due notice by appellee of the motion of the entry of such order of subrogation, nor of the hearing thereon, nor of the entry of said order.

Seventh. The court erred in holding that appellant had received a preference under the facts set forth in appellant's plea.

Eighth. The court erred in holding that the bill filed by the appellee, as trustee in bankruptcy, was sufficient to charge the appellant with accountability for receiving a preference within the terms of the Bankruptcy Act, as against the averments of the plea and the contracts therein relied upon by appellant.

2. The court erred in reversing the decree of the District Court of the United States for the Southern District of Illinois, Northern Division, holding the plea of appellant to be sufficient and dismissing said bill of complaint, for all of the reasons hereinabove specified in paragraph No. 1.

3. The court erred in not affirming the decree of the District Court of the United States for the Southern District of Illinois, Northern Division.

ARGUMENT.

We respectfully submit that the decree of the Circuit Court should be reversed and the bill dismissed upon the facts set up in the plea, which will be reviewed by this court in accordance with the opinion in Hewit *vs.* Berlin Machine Works, 194 U. S., 296.

The contracts under which the goods were delivered to the bankrupt, copies of which were filed with the plea, and are set out at pages 8 to 26 of the record, among other terms contain the following condition:

> "It is agreed that the right to the possession of all goods ordered or described generally or specifically in this contract, or which may be ordered and shipped to the purchaser hereafter during the life of this contract, as herein provided, and the proceeds (in case of sale of same) shall remain and inure to us, with the effect that we may hold or retake and subject the same as security (in the manner described by law for the subjection of chattels and foreclosure of chattel leases of like nature) to the indebtedness hereby contracted until full payment shall have been made by purchaser to us; and to this end the moneys and notes received on such sales shall be kept separate and apart from other moneys, papers and transactions, but nothing in this shall release purchaser from making payment as stipulated in this contract."

The character of the transaction is fixed at its inception and nothing short of a new agreement between the parties can alter the original nature of the contract. Where it appears from the circumstances of the case that the parties intended a sale to be conditional, although no condition has been expressed, a condition to be attached to the sale may be implied.

Story on Sales, sec. 253.

> "Whether a sale is absolute or conditional depends primarily upon the intention of the parties to be gathered from the terms of the contract and the circumstances of the case."
>
> 6 Am. Eng. Enc. Law (2d Ed.), 439.

In the case of Harkness *vs.* Russell, 118 U. S., 663, Bradley, J., in sustaining a contract of conditional sale, said:

> "Such contracts are well known in the law, and often recognized, and when free from any fraudulent intent, are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. . . . The intent of the parties will be recognized and sanctioned where it is not contrary to the policy of the law. . . . Where no fraud is intended but the honest purpose of the parties is that the vendee shall not have the ownership of the goods until he has paid for them, there is no general principle of law to prevent their purpose from having effect. *In this country . . . many decisions have been rendered sustaining conditional sales accompanied by delivery of possession both as between the parties themselves and as to third parties.*"

Under the law we may look to the intention of the parties in making the contract. It is manifest that the parties to said contracts had no other thought or intention to enter into any contract other than a conditional sale. The Rock Island Plow Company reserved expressly the right to possession of said goods under said contracts.

The right to possession was recognized by the parties to said contracts as equivalent to the retention of title. No fraud can be attached or urged to the making of said contracts. The right to possession by the Plow Company existed on the dates of making of said contracts, but was only exercised on November 25, 1907, *before*

the rights of third parties had intervened; and, under the authority of Story on Sales, section 253, the character of the transaction is fixed at its inception.

These contracts can not be construed otherwise than as contracts of conditional sale, and the validity of such contracts is too well recognized by the courts of Illinois to be questioned.

Emerson Piano Co. *vs.* Maund, 85 Ill. App., 453.
Kimball Co. *vs.* Cruikshank, 123 Ill. App., 581.
O'Neil *vs.* Rogers, 110 Ill. App., 622.

Under those contracts the Rock Island Plow Company retained in itself at all times the title and the right to possession of its goods until paid for by purchasers. It never at any time parted with the title and the bankrupt never at any time acquired the title thereto; and it is a well established rule of law that the trustee in bankruptcy stands in the shoes of the bankrupt himself and takes no better title than the bankrupt had as of the date of adjudication. In other words, the trustee by virtue of his becoming such, does not take the estate of the bankrupt as an innocent purchaser or a third person, but takes it subject to all valid liens, claims, and demands outstanding against the bankrupt.

Thompson *vs.* Fairbanks, 196 U. S., 516.

Such being the law, it is certain up to this point that as between the Rock Island Plow Company and Frank Brown, bankrupt, and W. J. Reardon, trustee, that, so far as in legal effect he was by the mere act of adjudication of the bankrupt invested with title to any property rights of or belonging to the bankrupt, the Rock Island Plow Company, having before the adjudication (Rec., p. 43) exercised its right to take possession of the goods, has better right and title to the same than either the

bankrupt or his trustee, and that the Rock Island Plow Company has good title to the same as against the world, unless on the day it took them the Peoria Cordage Company or the D. M. Sechler Carriage Company had some superior rights, to which the trustee has since been subrogated.

Hardin *vs.* Osborne, 94 Ill., 571.
Burgett *vs.* Paxton, 99 Ill., 288.
O'Hara *vs.* Jones, 46 Ill., 288.
Matter of Bates, Assignee, 118 Ill., 524.
Field *vs.* Ridgely, 116 Ill., 424.
Union Trust Co. *vs.* Trumbull, 137 Ill., 146.

In other words, the trustee, to prevail in this cause, must find some creditor of the bankrupt who had a better right to the Plow Company's goods in the hands of the bankrupt on the day the Plow Company took them from the bankrupt, than the Plow Company itself had, and, must, if at all, succeed in his contentions, here, by being subrogated to that creditor's rights for the benefit of the entire bankrupt estate. If there was no such creditor, or, if that creditor's rights have been lost by laches or limitations, the trustee can not now prevail.

The legal status and effect of the executions of the Peoria Cordage Company and the D. M. Sechler Carriage Company in the hands of the sheriff of Tazewell County, Illinois, must be determined by the statutes and decisions of the State of Illinois. Section 9 of Chapter 77, Illinois Revised Statutes (Hurd (1905) 1254), provides, "that no execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the sheriff or other proper officer *to be executed*. . . . But it does not provide, nor is there elsewhere any provision, that *when* such execution is

delivered *"to the sheriff or other proper officer to be executed"* such execution then and thereby *binds the goods and chattels of the person against whom it is issued."* And such is not the legal effect of the issuing of an execution, but, to make the same binding against the goods and chattels of the person against whom it is issued, it must be *executed.* And to execute an execution is to make a levy upon the execution debtor's goods.

Now what are the facts in this case? The sheriff of Tazewell County, Illinois, in which the goods in question were on that day situated, received into his hands on the 14th day of November, 1907 (Rec., p. 34), the Peoria Cordage Company's execution issued against the property of Frank Brown out of the county court of Peoria County, Illinois, on a confession of judgment therein by him of date the 14th day of November, 1907, in favor of said Peoria Cordage Company. But the sheriff made no levy upon the goods involved herein (Rec., p. 35), although the said goods were and remained with the bankrupt until November 25, 1907. And in like manner, the sheriff made no levy (Rec., p. 35) on any of the said goods when, on the 24th day of November, 1907, he received out of the same court another execution against the same Frank Brown on a confession of judgment of date the 13th of November, 1907, in favor of the D. M. Sechler Carriage Company. On the 25th day of November, 1907, the Rock Island Plow Company took possession of the said goods which it found the bankrupt still had (Rec., pp. 34–35). Were the executions of the Peoria Cordage Company and the D. M. Sechler Carriage Company superior to the rights and interests of the Rock Island Plow Company when it took possession of the goods on November 25, 1907?

The statutory or judicially determined rules of prop-

erty of the State of Illinois control and determine the validity of such liens, if any, as the Peoria Cordage Company and the D. M. Sechler Carriage Company obtained by their judgments and executions.

Collier on Bankruptcy (6th Ed.), 553.
Humphrey *vs.* Tatman, 198 U. S., 91, 14 Am. Bk. Rep., 74.
Thompson *vs.* Fairbanks, 196 U. S., 516, 13 Am. Bk. Rep., 437.
In re First Nat'l, 14 Am. Bk. Rep., 186, 135 Fed. Rep., 62.
In re Greene, 13 Am. Bk. Rep., 504, 134 Fed. Rep., 137.

Under the laws and judicially determined rules of property in Illinois, the liens of the Peoria Cordage Company and the D. M. Sechler Carriage Company executions which had not been perfected and made absolute and effective by levy, were, on November 25, 1907, defeated and lost in consequence of the repossession of its goods then in the possession of the bankrupt, by the Rock Island Plow Company under the said conditional sale contracts, and thereafter neither the sheriff nor the trustee of Brown had the right to follow and take the same away from the Plow Company.

People *vs.* Johnson, 4 Brad. (Ill. App.), 346.
Peters *vs.* McConnell, 16 Ill. App., 526.
Travers *vs.* Cook, 42 Ill. App., 580 (582).
Minor *vs.* Herriford, 25 Ill., 344.
Davidson *vs.* Waldron, 31 Ill., 120.
Chittenden *vs.* Rogers, 42 Ill., 100.

"In Mulheisen *vs.* Lane, 82 Ill., 117, it is held that an officer acquires no such interest in property, prior to his seizure thereof under his execution, as will give him the right to recover the

> value thereof in an action of trover, or the property itself in replevin, and that *until after a levy he has no such right in the property that he can maintain any action in respect thereof, and that the mere right to levy upon the property gives the officer no interest in the property itself.*"

See, also:

> Davidson *vs.* Waldron, 31 Ill., 120.
> Powers *vs.* Wheeler, 63 Ill., 29.

We are therefore compelled to conclude that since the said executions in the hands of the sheriff were not executed—were not levied—upon the goods before the Rock Island Plow Company took the same back again into its own possession under and by virtue of said conditional sale contracts, said executions gave no rights to either the said Peoria Cordage Company or to the said D. M. Sechler Carriage Company which were superior to the rights and interests of the Plow Company. More than that, we are compelled to conclude that because no levy was made under either of them, neither acquired any rights by virtue of the said executions so far as the goods retaken by the Plow Company was concerned.

In the case In re J. B. Hopkins, 1 Am. Bk. Rep., 209, the court says (at page 212) concerning an execution in the hands of an officer and under which no levy has been made:

> "There is no reason for any distinction between voluntary and involuntary bankrupts. It is to be observed that the . . . execution never by levy or otherwise became a lien upon any specific property—the most that can be claimed for it is, that from the time it came into the hands of the

> officer it became what may be styled, an inchoate lien, under the statute upon all the debtor's property—a lien which might be enforced by a levy and sale of specific property, or entirely lost by laches. . . .
>
> "I am of the opinion that whatever lien was secured by the delivery of this execution into the hands of the officer on the second day of July, 1898, is to be *deemed null and void.*"

We are therefore compelled to find, without inquiring further into it, that the order of subrogation (Rec., p. 30), made and entered January 21, 1908, by the referee in bankruptcy, was in fact and in legal effect empty and void of all effect, and the trustee took nothing whatever thereby.

It surely will not be contended by the appellant that the referee's order of subrogation, if it had any effect at all, operated to do more than to merely place the appellant in possession of whatever rights, if any belonging to the D. M. Sechler Carriage Company. It certainly can not be said that the referee had the power to stop the running of any statute by his action in subrogating the trustee to the rights of a judgment and execution creditor. Such extraordinary powers are not conferred upon the referee. Nor can it be said that the trustee's bill of complaint (Rec., pp. 2–5) filed herein January 24, 1908, contained any allegations to the effect that the trustee based his suit upon any rights belonging in the premises to the D. M. Sechler Carriage Company. So that by the filing of that bill in which he merely complains of a preference and in which he is silent as to any rights of the D. M. Sechler Carriage Company, he can not now be heard to say that when he began this suit, he began it or rested it upon any rights of that company. And if in the meantime any right

became extinct by limitation, it is not and can not be thereby revived.

The authority of the case of Sabin *vs.* Camp, 3 Am. Bk. Rep., 578, 98 Fed. Rep., 974, is squarely in point and decisive of the contention of the appellee that the retaking of the goods by the appellant amounted to a voidable preference under the Bankruptcy Act. In that case instead of the sale of goods there was a loan of money to the bankrupt under an agreement that if bankrupt failed to pay the sums loaned upon demand after six months from the date of the first loan, the lender might take possession of the property purchased with the money loaned. And in that case the lender when the first payment became due, made demand therefor, and upon default took possession of the property and within less than four months thereafter the debtor was adjudged a bankrupt. The court held that the lender, in taking possession of the property under the agreement, *did not thereby secure a voidable preference.*

In conclusion we refer especially to the case of Thompson *vs.* Fairbanks (supra) as showing that although a levy was actually made under an attachment on the goods, the proceeds of which went to Fairbanks, yet this court says:

> "So in this case although there was no actual existing lien upon this after acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession under the facts in this case, related back to the time of the execution of the mortgage. . . .
>
> "Under the present Bankruptcy Act, the trustee takes the property of the bankrupt in cases un-

> affected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all of the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

We respectfully submit that the case should be remanded with directions to dismiss the bill.

W. H. SHOLES,
Solicitor for Appellant.

WALTER H. KIRK,
CONNELLY & CONNELLY,
Of Counsel for Appellant.

Office Supreme Court, U. S.
FILED.
DEC 7 1911
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 98.

ROCK ISLAND PLOW COMPANY, Appellant,

vs.

W. J. REARDON, TRUSTEE IN BANKRUPTCY OF FRANK BROWN, BANKRUPT.

BRIEF FOR APPELLEE.

IRA J. COVEY,
Solicitor for Appellee.

FRANKLIN L. VELDE,
Of Counsel for Appellee.

IN THE

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OCTOBER TERM, 1911.

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ROCK ISLAND PLOW COMPANY, Appellant,

vs.

W. J. REARDON, TRUSTEE IN BANKRUPTCY OF FRANK BROWN, BANKRUPT.

BRIEF FOR APPELLEE.

It is the contention of the appellee that the contracts under which the appellants claim to have taken possession of the goods in question were fraudulent and void as to the appellee acting as trustee in bankruptcy of Frank Brown.

Second: That the contracts in question were not conditional sale contracts for the reason that they did not contain any provision retaining title in the seller.

Third: That treated as a conditional sale contracts, they furnished no defense to the rights of the appellee as trustee who was vested with the rights of execution creditors under the subrogation order of the district court.

Where goods are sold to the bankrupt upon credit, and upon the understanding that the title to such of them as should not be sold by him should remain in the vendor until payment of the purchase price or that the goods or the proceeds should be held by the purchaser as security the purchaser being in actual possession, the transaction can not be upheld as a conditional sale, and is a fraud upon the creditors of the vendee. The title to the goods vests absolutely in the buyer and passes to his trustee in bankruptcy under Section 70a, the language of which is sufficiently comprehensive to vest the trustee with title to all property of the bankrupt as against the fraudulent title of another.

In re, Garcewich 8 Am. B. R., 149; 115 Fed., 87; 53 C. C. A., 510 (2d Cir).

Pontiac Buggy Co. vs. *Skinner*, 20 Am. B. R., 206; 158 Fed., 858 (Northern District of N. Y.)

Robinson vs. *Elliott*, 22 Wallace, 513.

In re, Rodgers, 11 Am. B. R., 93; 125 Fed. 169; 60 C. C. A., 567, (7th Circuit).

In re, Carpenter, 11 Am. B. R., 147; 125 Fed., 831.

Security Warehouse Co. vs. *Hand*, 206 U. S., 415; 19 Am. B. R., 291.

In re, Antigo Screen Door Co., 123 Fed., 249; 59 C. C. A., 248; 10 Am. Bank. Rep., 359, (7th Circuit).

In re, Rasmussen, 136 Fed., 704; 13 Am. B. R., 462 (Dist. Court of Oregon).

In re, Gault, 120 Fed., 443; 9 Am. B. R., 682; (Northern Dist. of Ill.).

Skilton vs. *Codington*, 185 N. Y., 80; 15 Am. B. R., 810, (N. Y. Court of App.).

In re, Perkins, 19 Am. B. R., 134; 155 Fed., 237, (Dist. Court of Maine).

In re, George Hassam & Son, 153 Fed., 932; 18 Am. B. R., 745.

Union Trust Co. vs. *Trumbull*, 137 Ill., 146.

Deering Shoe Co. vs. *Washburn*, 141 Ill., 153

In re, Tucker, 161 Fed., 584.

Mitchell vs. *Mitchell*, 147 Fed., 280.

The agreements in this case are peculiar. They do not contain the usual provisions of contracts of this kind that the title to the goods shall remain in the vendor until they are paid for. The most that can be said of these contracts is that they give to the vendor a sort of chattel mortgage lien. They provide that "The right to the possession of all goods ordered

and the proceeds (in case of sale of same) shall remain in and inure to us (Rock Island Plow Company); with the effect that we may hold or retake and subject the same as security (in manner described by law for the subjection of chattels and foreclosures of chattel liens of like nature) to the indebtedness hereby contracted until full payment shall have been made by the purchaser, and to this end the moneys and notes received on such sales shall be kept separate and apart from other letters, papers and transactions, but nothing in this shall release the purchaser from making payment as stipulated in this contract." (Record page 12). These contracts clearly gave the bankrupt the right to resell the goods in the usual course of his business, and did not make it obligatory on him to pay over the proceeds of the sales as made to the vendor. This is shown by the provision that the proceeds of the goods "in case of sale of same," shall be held as security, etc., and "That all goods herein or hereafter ordered are bought and *to be sold* subject to the usual manufacturer's warranty."

THE TRUSTEE STANDS IN THE POSITION OF AN EXECUTION CREDITOR.

Section 67 c and f of the Bankruptcy Act of 1898, provides as follows:

"A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including

an attachment upon *mesne process* or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy, against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be

deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the Court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate."

In the case of *First National Bank of Baltimore* vs. *Staake, trustee*, 202 U. S. 141; 15 Am. B. R., 630, this Court held that where attachments were obtained by creditors on bankrupt's property within four months of the filing of the petition in bankruptcy that the District Court had the right under Section 67 f to order the trustee subrogated to the rights of the attaching creditors, and said:

"The liens acquired in this case were liens upon property, which as to attaching creditors was the property of the bankrupt, and Congress may lawfully insist that it shall be reckoned as a part of his estate, and pass to the trustee. As remarked by the Court of Appeals: "The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors."

In the case of *In re, N. Y. Economical Printing Co.*, 110 Fed. Rep., 514; 49 C. C. A., 33; 6 Am. B. R., 620, Judge Wallace of the Court of Appeals for the 2d Circuit, in passing upon the position occupied by

the trustee in bankruptcy, who represented an execution creditor, as to property located in New York State covered by an unrecorded chattel mortgage, said:

"The Bankrupt Act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalil as to creditors for want of record, it is invalid as to the trustee; and if it is one which was invalid as to some particular creditor, though valid as to other creditors, the trustee is in certain cases subrogated to the rights of that creditor."

"Subdivision "b," Section 67 (Act of 1898), preserves for the benefit of the estate in bankruptcy a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy. If a creditor, by an execution or a creditor's bill, has secured a legal or equitable lien upon the mortgaged property before the mortgagor has been adjudicated a bankrupt, under this provision his rights will or will not inure to the benefit

of the estate, depending upon the time when the lien was acquired. If acquired more than four months before the commencement of the bankruptcy proceeding, his lien would inure to his own exclusive benefit; but, if acquired at any time within four months, it would be null and void under subdivision "f" of the section, except as preserved for the benefit of the estate as provided in that subdivision and in subdivision "b."

Appellant claims that the order subrogating the trustee to the rights of the execution creditors is invalid because no notice of the application for the order of subrogation was given to it. We contend that it was not necessary to give notice of this application to the Rock Island Plow Company. Subdivision "f" of Section 67 of the Bankruptcy Act provides that the judgment or execution shall be preserved for the benefit of the estate "on due notice" being given. Notice of the application for the order of subrogation was given to the Peoria Cordage Company and D. M. Sechler Carriage Co., who were the only persons interested or entitled to notice.

Judge Lowell of the District Court of Massachusetts, in the case of *In re, Merrow*, 131 Fed., 993; 12 Am. 615, had before him a petition of the trustee to be subrogated to the rights of the attaching creditors. There, as here, the attaching creditors in open Court

assented to the granting of the petition. In rendering his opinion, Judge Lowell said:

The only controversy here possible concerning the rights arising thereunder is between the attaching creditor and the trustee. As both these parties are agreed that the latter shall be subrogated to the rights of the former, the judgment of the referee is affirmed. See *In re, N. Y. Printing Co.*, 6 Am. B. R., 615, 110 Fed., 514; 49 C. C. A., 133."

There can be no question but what under the law of Illinois these goods which the Rock Island Plow Company received from the bankrupt two days before the petition in bankruptcy was filed and while both of these executions were in the hands of the sheriff of Tazewell County, could have been levied upon by the sheriff under these executions.

In the case of the *Peoria Mfg. Co.* vs. *Lyons*, 153 Ill., 427, it is held:

"A contract for the delivery of goods by a manufacturer to a retailer, which provides that such retailer shall give notes for the price of goods, and shall turn over all proceeds of sales to apply on such notes until fully paid, including commissions, is a sale of the goods, although the contract expressly reserves control over them until paid for, and such goods may be taken on execution against the retailer."

Section 1 of the Chattel Mortgage Act of Illinois, 2 Starr & Curtiss, 2743, provides:

"That no mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purposes of this Act, be deemed a chattel mortgage."

In the case of *St. Louis Iron & Machine Works* vs. *Kimball*, 53 Ill. App., 636, it is held:

"The title to personal property vests immediately in the vendee upon its sale and delivery to him, and under the law of this state a lien upon personal property to secure unpaid purchase money can be preserved against creditors of the purchaser, in one of two ways only. (1) By the vendor retaining possession of the property sold until the price is paid. (2) By the taking of a chattel mortgage upon the property securing the unpaid purchase money, and properly executed, acknowledged, entered and recorded as required by the chattel mortgage act."

"A written instrument accompanying a sale of

personal property providing that the title to the property should be and remain in the vendor until the covenants of the agreement to be performed as the consideration of the same by the vendee, should be complied with, not acknowledged, entered and recorded as required by the statute, is void as to creditors of the purchaser."

"Where by the terms of a contract, the purchaser is not obliged to, and in fact has no right to return the specific articles, but is at liberty to return the money value thereof, he becomes a debtor and the title to the proprty is changed. It is a sale."

"Where property is sold and delivered by the vendor to the vendee, it makes no difference what conditions may be attached to such sale for the security of the purchase price; by reserving a lien on the thing sold, or providing the title shall remain in the vendor till the property is paid for, as to execution creditors the absolute title to the property passes to the vendee."

If the goods could have been levied upon by the sheriff under these executions, then the trustee in bankruptcy representing now, as he does, these execution creditors, has the right to the goods in question. The mere fact that the defendant obtained possession of the goods prior to the filing of the petition in bankruptcy does not in any way strengthen its posi-

tion, as is shown by the case of *Antigo Screen Door Co.*, 123 Fed., 249.

It should also be borne in mind that these goods were bought by the bankrupt from the defendant on these contracts, which are dated from one and one-half to two years before the bankruptcy (Record page 31), and that the defendant had settled with the bankrupt several months before the bankruptcy, and taken his notes for the entire amount due under these contracts (Record page 39).

It is contended by the defendant that as the execution of the Peoria Cordage Company had been returned prior to the date of the order of subrogation on the 21st day of January, 1908, that the order of subrogation did not vest the trustee with any rights under the execution of the Peoria Cordage Company. Section 70a of the Bankruptcy Act provides that the trustee shall be vested by the operation of law with title as of the date of the adjudication of bankruptcy, and in *Collier on Bankruptcy*, 6th Edition, page 588, it is said:

"When the trustee is appointed his title goes back by relation to the date of the commencement of the proceeding."

The execution of the Peoria Cordage Company was placed in the hands of the sheriff of Tazewell County on November 14, 1907. The preference was

obtained by the defendant on November 25th. The petition in bankruptcy was filed on November 27th, and the Peoria Cordage Company's execution was returned November 29th. As the trustee's title relates back to the time of the filing of the petition on November 27th, at which time the execution was in the hands of the sheriff of Tazewell County, we maintain that the trustee represents the rights of the Peoria Cordage Company as they existed on November 27th. But even though the Court should hold that on account of the execution issued on the judgment of the Peoria Cordage Company having been returned before the order of subrogation was entered, that the trustee took no rights under that execution, this can have no effect whatever upon the sufficiency of the defendant's plea for the reason that the execution on the judgment of D. M. Sechler Carriage Company was placed in the hands of the sheriff of Tazewell County on the 24th day of November, 1907, one day prior to the time when the defendant obtained its preference, and this execution remained in the hands of the officer until February 24, 1908, which was more than a month after the order of subrogation was entered by the referee. This brings the case squarely within the ruling of this Court in the case of *First National Bank* vs. *Staake*, 202 U. S., 141. As the plea of the defendant purports to be an answer to the complainant's whole cause of action, even though the

Court should hold that the trustee in bankruptcy took nothing under the execution of the Peoria Cordage Company by the order of subrogation, still, as the trustee was vested under this order with the rights of the execution creditor, D. M. Sechler Carriage Company, the plea must be held bad, as it is not an answer to the complainant's whole cause of action.

In the case of *Gilbert* vs. *National Cash Register Co.*, 176 Ill., 288, the Court, on page 294, says:

"Where by the written contract of the parties it is expressly provided that the title to the property shall remain in the vendor until the purchase price is fully paid, and there is no reservation of a lien, the transaction is a conditional sale, and not a mortgage."

In the case at bar there is no provision that the title of the property shall remain in the vendor until the purchase price is paid, but there is probably an attempt to reserve a lien on the property until payment of the purchase price is made. The contracts in this case come nearer being chattel mortgages than anything else. On page 296, the Court also says:

"The cash register, referred to in the record in this case, was levied upon under an execution against W. H. Luther, while it was in possession of the latter. We think that such execution creditor was entitled to hold the register under his levy as against the appellee, claiming under the contract for a conditional

sale hereinbefore referred to. In Illinois, 'if a person agrees to sell to another a chattel on condition that the price should be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee, so as to clothe him with apparent ownership, a *bona fide* purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor.' (*Harkness* vs. *Russell*, 118 U. S., 678; *Brundage* vs. *Camp*, 21 Ill., 329; *McCormick* vs. *Hadden*, *37 id.*, 370; *Murch* vs. *Wright*, 46 *id.*, 487; *Michigan Central Railroad Co.* vs. *Phillips*, 60 *id.*, 196; *Lucas* vs. *Campbell*, 88 *id.*, 447; *Ven Duzor* vs. *Allen*, 90 *id.*, 499); whatever may be the rule in other jurisdictions, it is well settled in this state that the owner of personal property will not be permitted to sell it, either absolutely or conditionally, and still continue in possession of it. The party in possession of personal property is presumed to be the owner of it, possession being one of the strongest evidences of title to personal property. 'To suffer, without notice to the world, the real ownership to be in one person and the ostensible ownership in another, gives a false credit to the latter, and in this ways works an injury to third persons.' "

It is contended that the trustee does not occupy any stronger position than the bankrupt did because the executions of the Peoria Cordage Company and D. M. Sechler Carriage Co. were not levied before

bankruptcy, but this position is not borne out by the decided cases. *First National Bank of Baltimore* vs. *Staake*, 202 U. S., 141, holds: "The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens, which although valid as to the bankrupt, are invalid as to creditors." The word "creditors" as used in this connection was defined by the Supreme Court of Illinois in *Union Trust Company* vs. *Trumbull*, 137 Ill., on page 180: "By 'creditors' is meant not general creditors or creditors at large, and only such creditors as are armed with an execution or writ of attachment or other process of court, are regarded as 'creditors' in the sense that they are authorized to impeach a conveyance or transfer of property by their debtors for fraud or question the validity of an equitable lien on personal property that is good as against such debtors themselves, and their heirs, executors, administrators and voluntary assignees." The Court of Appeals for the Eighth Circuit in the case of *in re. Pekin Plow Company*, 112 Fed. Rep. 308, 7 Am. B. R., 369, in passing upon the validity of an unrecorded chattel mortgage in the State of Nebraska where the statute with regard to recording is similar to the Illinois statute, quotes from *Bank* vs. *Anthony*, 39 Neb., 343, as follows: "The term 'creditor' in this statute, means a judgment, execution, or attachment creditor;

that is, a creditor who is using the courts of law and their processes for the collection of his debt."

The rule at common law was that an execution created a lien on personal property from the date of the issuance of the writ, but Section 9, Chapter 77, Hurd's Illinois Revised Statutes (1909), page 1364, provides "That no execution shall bind the goods and chattels of the person against whom it is issued until its delivery to the sheriff or other person to be executed." The effect of this statute is to give the officer a lien on personal property from the date it is received by him, as shown by *Frink* vs. *Pratt & Co.*, 130 Ill., 327, 331, where it is said: "An execution is a lien upon the personal property of the debtor not exempt, from the time it comes to the officer's hands, and gives the officer the right to seize and sell the same for the satisfaction of the judgment upon which it has been issued."

Cases cited by appellant to show that the officer receiving the execution has no interest in the property itself, and cannot maintain an action of replevin or trover until after a levy is made, are not in point here, for the reason that the only question is as to whether the trustee after being subrogated to the rights of the execution creditors has a lien on the property, and if so, his interests as trustee are such that the title to the property passed from the appellant, so that a levy could have been made by the sheriff.

The question is not as to whether the sheriff or the trustee could have maintained trover or replevin, but the question is, did the title pass from the Plow Company to the bankrupt, Brown, so that a levy could have been made on it. If a levy could have been made on this property then it became a part of the general mass of Brown's property and he had no right to prefer the appellant by transferring it to the appellee.

The case of *Sabin* vs. *Camp*, 96 Federal, 974, is cited to show that on the facts which appear in the record that the appellant has not been preferred. In that case the trustee in bankruptcy stood in the position of the bankrupt, and the contract was good as between the parties. Here the trustee stands in the position of an execution creditor and the contract is void as to execution creditors. The appellant under these contracts as against execution creditors had no specific claim on the goods in question and it became a simple contract creditor.

As the bankrupt was insolvent on the day of the transfer as alleged by the bill, and which is not denied by the plea, and as the retention of these goods by the appellant will give to it a greater portion of its claim than other creditors will receive, the appellant has been preferred and the appellee is entitled to recover the goods, or the value thereof.

All of which is respectfully submitted,

IRA J. COVEY,
Solicitor for Appellee.

FRANKLIN L. VELDE,
Of Counsel for Appellee.

ROCK ISLAND PLOW COMPANY *v.* REARDON, TRUSTEE IN BANKRUPTCY OF BROWN.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 98. Submitted December 11, 1911.—Decided January 9, 1912.

A bankrupt, in Illinois, within a few days of filing a petition in voluntary bankruptcy, confessed judgments upon which executions were issued and returned unsatisfied but no actual levy was made; thereafter and before filing the petition he transferred goods in his possession to the vendor thereof, who claimed they had been delivered on conditional sales; the trustee began subrogation proceedings to preserve the liens of the judgments for the benefit of the estate, to which the judgment creditors assented, and also commenced proceedings to compel redelivery of the goods transferred on ground that lien of judgments inured to estate; the trustee had also claimed a right to recover the goods on the ground of unlawful preference; *held*, that

Under the law of Illinois, delivery to the sheriff of the executions on the judgments operated without levy to create liens upon the property of the judgment debtor within the county.

Such liens were paramount to rights in the property possessed by the vendor under contracts of conditional sale.

The effect of the subrogation order was to render inoperative as a preference in favor of the judgment creditors the liens obtained through the executions and to preserve such liens as of the date of filing the petition for the benefit of the estate. *First National Bank* v. *Staake*, 202 U. S. 141.

Liens of execution creditors, as they exist when a petition of involuntary bankruptcy is filed, cannot be subsequently destroyed by acts of the creditors to the prejudice of the estate.

As the holder of the goods had not been prejudiced by the proceedings to recover for unlawful preference, the trustee was not barred from asserting the lien of the judgments on the same goods for the benefit of the estate.

168 Fed. Rep. 654, affirmed.

WHETHER the Plow Company or Reardon, as trustee of the bankrupt estate of Frank Brown, has the better right to certain personal property delivered by Brown to the Plow Company is the question to be decided on this record.

The facts pertinent to the controversy are these: Brown was a merchant and engaged in business at Pekin, Tazewell County, Illinois. On November 13, 1907, he confessed judgment for $247.15 and $400 and costs in favor of a creditor, the Peoria Cordage Company, a corporation, and on the same day an execution was issued, which was received and endorsed by the sheriff of Tazewell County on the following day. On November 23, 1907, Brown confessed judgment in favor of another creditor, the D. M. Sechler Carriage Company, a corporation, for the sum of $282.25 and $400, with costs, and on the same day execution issued, and on the next day was received and endorsed by the sheriff of Tazewell County. While these executions were outstanding and unsatisfied, Brown, on November 25, 1907, delivered merchandise, consisting of gang plows, cultivators and other farm implements of the value of $500, to the Rock Island Company, appellant, and as the result of the transaction an indebtedness of Brown to the Plow Company of $406 was extinguished. When the goods were delivered to the Plow Company Brown was insolvent and the Plow Company had reason to believe that such was the fact. Two days after the delivery of the property to the Plow Company Brown filed a petition in voluntary bankruptcy, and Reardon was subsequently qualified as trustee of the bankrupt estate.

Seeking to avail of the provisions of § 67, paragraphs *c* and *f* of the Bankruptcy Act, the trustee, on January 21, 1908, filed with the referee a petition setting forth the obtaining of the judgments by the Sechler and Cordage companies heretofore referred to, that the executions issued on those judgments were liens from the date of receipt by the sheriff on all the real and personal prop-

erty of the bankrupt located in Tazewell County, Illinois, and continued to be liens down to the date of the filing of the petition in bankruptcy, and prayed that the liens of said executions might be declared null and void as to the Sechler and Cordage companies, but might be preserved for the benefit of the estate in bankruptcy. The creditors just named entered their appearance and consented that the prayer of the petition be granted, and an order was entered on the date when the petition was filed granting the relief sought.

Three days after the entry of the subrogation order the trustee commenced this litigation by filing a bill of complaint on the chancery side of the District Court of the United States, Southern District of Illinois, Northern Division—the same court in which the bankruptcy proceedings were pending. The petition assailed the transfer and delivery of property by Brown to the Plow Company on November 25, 1907, heretofore referred to, as an unlawful preference. The court was asked to decree a surrender of the property to the trustee or payment of its value. On March 27, 1908, the Plow Company filed its plea, and therein in substance contended that the assailed transaction was not an unlawful preference. It averred that it had previously delivered the property to Brown, under and by virtue of the terms of certain written contracts, annexed as exhibits to the plea; that the title of such property "always was and remained in" the Plow Company; and, that it "lawfully took and repossessed itself" of the property by reason of the failure of Brown to pay for the same according to the contracts. Shortly after, the trustee, by leave, filed an amendment to his bill of complaint. The amendment consisted in detailing the facts as to the obtaining of the judgments of the Sechler and Cordage companies heretofore referred to, and an issue of executions on the judgments prior to the transfer of Brown to the Plow Company, and that the executions

were outstanding at the time of the filing of the petition in bankruptcy. The proceedings before the referee culminated in the order preserving the liens of the judgments for the benefit of the bankrupt estate were next set forth, and it was claimed that the liens thereby preserved were superior to any claim which the Plow Company had to the goods in controversy. In a plea to the amended bill the Plow Company reiterated the facts upon which it based the claim that in receiving the goods from Brown it merely took possession of its own property and had not obtained an unlawful preference. It further sets forth that when it received the goods no levy had been made under either of the executions issued upon the judgments obtained by the Sechler and Cordage companies, and that in consequence it had the superior right to the goods. Want of notice of the subrogation proceedings and the consequent invalidity of the order of subrogation was also averred. It was in addition averred that the judgment in favor of the Cordage Company was not a valid lien on January 21, 1908, the date when the order of subrogation was made, because prior thereto the execution had been returned to the sheriff and filed and docketed in the court which had issued the same. Furthermore, it was averred that the execution on the Sechler judgment had been returned by the sheriff with an endorsement, "no property found," and was filed on February 22, 1908, in the court from which it had issued, and that rights based upon the issue of such execution could not be originated thereafter, viz., on April 16, 1908, when the amended bill was filed.

The cause was heard upon the sufficiency of the plea just reviewed, and the plea was held sufficient. The trustee elected not to file a reply to the plea, and a decree was thereupon entered dismissing the bill. On appeal the decree of dismissal was reversed by the Circuit Court of Appeals (168 Fed. Rep. 654), and this appeal was then taken.

Mr. W. H. Sholes, with whom *Mr. Walter H. Kirk* was on the brief, for appellant:

The contracts under which the goods were delivered to the bankrupt contain a condition that the "right to the possession of all goods shall remain and inure to the Plow Company, with the effect that it may hold or retake and subject the same as security (in the manner described by law for the subjection of chattels and foreclosure of chattel leases of like nature) to the indebtedness hereby contracted until full payment shall have been made by purchaser."

The character of the transaction is fixed at its inception and nothing short of a new agreement between the parties can alter the original nature of the contract. Where it appears from the circumstances of the case that the parties intended a sale to be conditional, although no condition has been expressed, a condition to be attached to the sale may be implied. Story on Sales, § 253; 6 Am. & Eng. Enc. Law (2d ed.), 439; *Harkness* v. *Russell*, 118 U. S. 663.

The right to possession was recognized by the parties to said contracts as equivalent to the retention of title. No fraud can be attached or urged to the making of said contracts. The right to possession by the Plow Company existed on the dates of making of said contracts but was only exercised on November 25, 1907, before the rights of third parties had intervened.

These contracts cannot be construed otherwise than as contracts of conditional sale, and the validity of such contracts is well recognized by the courts of Illinois. *Emerson Piano Co.* v. *Maund*, 85 Ill. App. 453; *Kimball Co.* v. *Cruikshank*, 123 Ill. App. 581; *O'Neil* v. *Rogers*, 110 Ill. App. 662.

The trustee in bankruptcy stands in the shoes of the bankrupt himself and takes no better title than the bankrupt had as of the date of adjudication. He does not take

the estate of the bankrupt as an innocent purchaser or a third person, but takes subject to all valid liens, claims and demands outstanding against the bankrupt. *Thompson* v. *Fairbanks*, 196 U. S. 516; *Hardin* v. *Osborne*, 94 Illinois, 571; *Burgett* v. *Paxton*, 99 Illinois, 288; *O'Hara* v. *Jones*, 46 Illinois, 288; *Matter of Bates, Assignee*, 118 Illinois, 524; *Field* v. *Ridgely*, 116 Illinois, 424; *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146.

In other words, the trustee, to prevail in this cause, must find some creditor of the bankrupt who had a better right to the Plow Company's goods in the hands of the bankrupt on the day the Plow Company took them from the bankrupt, than the Plow Company itself had, and must, if at all, succeed in his contentions, here, by being subrogated to that creditor's rights for the benefit of the entire bankrupt estate. If there was no such creditor, or if that creditor's rights have been lost by laches or limitations, the trustee cannot now prevail. The statutory or judicially determined rules of property of Illinois control and determine the validity of such liens, if any, as the Cordage Company and the Carriage Company obtained by their judgments and executions. Collier on Bankruptcy (6th ed.), 553; *Humphrey* v. *Tatman*, 198 U. S. 91; *In re First Nat'l Bank*, 135 Fed. Rep. 62; *In re Greene*, 134 Fed. Rep. 137.

Under the laws and judicially determined rules of property in Illinois, the liens of the Cordage Company and Carriage Company executions which had not been perfected and made absolute and effective by levy, were, on November 25, 1907, defeated and lost in consequence of the repossession of its goods then in the possession of the bankrupt, by the Plow Company under the said conditional sale contracts, and thereafter neither the sheriff nor the trustee had the right to follow and take the same away from the Plow Company. *People* v. *Johnson*, 4 Brad. (Ill. App.) 346; *Peters* v. *McConnell*, 16 Ill. App. 526;

Travers v. *Cook*, 42 Ill. App. 580 (582); *Minor* v. *Herriford*, 25 Illinois, 344; *Davidson* v. *Waldron*, 31 Illinois, 120; *Chittenden* v. *Rogers*, 42 Illinois, 100; *Mulheisen* v. *Lane*, 82 Illinois, 117. See also *Davidson* v. *Waldron*, 31 Illinois, 120; *Powers* v. *Wheeler*, 63 Illinois, 29; *In re J. B. Hopkins*, 1 Am. Bk. Rep. 209.

Mr. Franklin L. Velde, with whom *Mr. Ira J. Covey* was on the brief, for appellee:

The contracts under which the appellants claim to have taken possession of the goods in question were fraudulent and void as to the appellee acting as trustee in bankruptcy.

The contracts in question were not conditional sale contracts as they did not contain any provision retaining title in the seller.

Treated as conditional sale contracts, they furnished no defense to the rights of the appellee as trustee who was vested with the rights of execution creditors under the subrogation order of the district court.

Where goods are sold to the bankrupt upon credit, and upon the understanding that the title to such of them as should not be sold by him should remain in the vendor until payment of the purchase price or that the goods or the proceeds should be held by the purchaser as security the purchaser being in actual possession, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee. The title to the goods vests absolutely in the buyer and passes to his trustee in bankruptcy under § 70*a*. *In re Garcewich*, 8 Am. Bk. Rep. 149; 115 Fed. Rep. 87; *Pontiac Buggy Co.* v. *Skinner*, 158 Fed. Rep. 858; *Robinson* v. *Elliott*, 22 Wall. 513; *In re Rodgers*, 125 Fed. Rep. 169; *In re Carpenter*, 125 Fed. Rep. 831; *Security Warehouse Co.* v. *Hand*, 206 U. S. 415; *In re Antigo Screen Door Co.*, 123 Fed. Rep. 249; *In re Rasmussen*, 136 Fed. Rep. 704; *In re Gault*, 120 Fed. Rep. 443; *Skilton* v. *Codington*, 185 N. Y. 80; *In re Perkins*,

155 Fed. Rep. 237; *In re George Hassam*, 153 Fed. Rep. 932; *Union Trust Co.* v. *Trumbell*, 137 Illinois, 146; *Deering Shoe Co.* v. *Washburn*, 141 Illinois, 153; *In re Tucker*, 161 Fed. Rep. 584; *Mitchell* v. *Mitchell*, 147 Fed. Rep. 280.

The agreements in this case are peculiar. They do not contain the usual provisions of contracts of this kind that the title to the goods shall remain in the vendor until they are paid for. The most that can be said of these contracts is that they give to the vendor a sort of chattel mortgage lien.

The trustee stands in the position of an execution creditor. Section 67, pars. *c* and *f* of the Bankruptcy Act of 1898; *First National Bank* v. *Staake, Trustee*, 202 U. S. 141; *In re N. Y. Economical Printing Co.*, 110 Fed. Rep. 514; *In re Merrow*, 131 Fed. Rep. 993.

The only controversy here possible concerning the rights arising thereunder is between the attaching creditor and the trustee. As both these parties are agreed that the latter shall be subrogated to the rights of the former, the judgment of the referee is affirmed. See *In re N. Y. Printing Co.*, 6 Am. Bk. Rep. 615; 110 Fed. Rep. 514; 49 C. C. A. 133.

Under the law of Illinois these goods which the Plow Company received from the bankrupt two days before the petition was filed and while both of these executions were in the hands of the sheriff, could have been levied upon by him. *Peoria Mfg. Co.* v. *Lyons*, 153 Illinois, 427; Chattel Mortgage Act, 2 Starr & Curtiss, 2743; *St. Louis Iron Works* v. *Kimball*, 53 Ill. App. 636.

If the goods could have been levied upon by the sheriff under these executions, then the trustee in bankruptcy representing now, as he does, these execution creditors, has the right to the goods in question. *In re Antigo Screen Door Co.*, 123 Fed. Rep. 249; Collier on Bankruptcy (6th ed.), 588; see also *Gilbert* v. *National Cash Register Co.*, 176 Illinois, 288, and cases cited.

MR. CHIEF JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

The only question arising for decision is whether the facts set up in the plea of the Plow Company are sufficient to exempt that company from accountability to the trustee for receiving a preference within the terms of the Bankruptcy Act. The consideration which this question received in the opinion delivered by the Circuit Court of Appeals makes unnecessary any elaborate review of the subject.

We assume, for the sake of argument, as did the Circuit Court of Appeals, that the contracts by virtue of which the Plow Company claimed it re-took possession of the property in question were conditional sale contracts, whereby the Plow Company retained in itself the title and right of possession of its goods until paid for by Brown, and that by virtue of such contracts the taking or re-taking of the property in question was valid as between the Plow Company and the bankrupt. The inquiry then is whether the contracts and the possession taken thereunder of the property in controversy by the Plow Company are operative to bar the rights asserted by the trustee in and by force of the subrogation proceedings. The claim of the trustee was in substance, 1, that delivery to the sheriff of executions upon the Sechler and Cordage judgments operated without levy to create liens upon the real and personal property of Brown the judgment debtor within the county; 2, that such liens were paramount to rights in the property possessed by a vendor under a contract of conditional sale; and, 3, that the effect of the subrogation order was to render inoperative as a preference the liens obtained by the judgment creditors through their executions, and to preserve such liens as of the date of the filing of the proceedings in voluntary bankruptcy for the benefit of the estate in bankruptcy.

That the Circuit Court of Appeals rightly held the affirmative of these three propositions we entertain no doubt. Upon the first two propositions that court said (p. 658):

"As the law of Illinois must govern the answer to both questions, and the rule there is well settled, as we believe, for an affirmative answer to each, no difficulty appears in the solution. Paragraph 9 of chapter 77, Rev. St. Ill., 1874 (2 Starr & C. Ann. St., 1896, p. 2336) provides: 'No execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the sheriff or other proper officer to be executed.' This is a modification of the rule at common law which created a lien from the issuance of the writ, and its effect to create a lien in favor of the execution creditor is recognized in numerous decisions noted in Starr & C. Ann. St., supra. See *Frink* v. *Pratt & Co.*, 130 Illinois, 327, 331, one of the citations in appellee's brief. The cases cited contra, declaratory of the rule that an officer receiving the execution has 'no interest in the property itself' to maintain an action therefor 'until after a levy,' do not touch the present inquiry of lien in favor of the execution creditor, and are plainly inapplicable. Upon the second question, it is stated in *Gilbert* v. *Nat. Cash Register Co.*, 176 Illinois, 288, 296, that 'whatever may be the rule in other jurisdictions,' this rule is established in Illinois: 'If a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee so as to clothe him with an apparent ownership, a *bona fide* purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor.' The authorities there cited for such rule are deemed sufficient reference; and we remark that no departure appears from the doctrine thus stated in any of the Illinois cases called to our attention."

It is significant that in the argument at bar counsel for the Plow Company make no attempt to point out wherein the authorities cited by the court are not applicable and authoritative on the propositions which they were cited as supporting, and indeed entirely omit any reference to them.

The decision in *First National Bank* v. *Staake*, 202 U. S. 141, 146, is authoritative upon the last proposition. As the executions issued upon the judgments, which executions were held by the sheriff for levy, operated to create liens upon the property in question, then in the possession of Brown although held under conditional sale contracts, and such liens were paramount to the rights of the vendor, the Plow Company, it is manifest that the right of the judgment creditors to resort to such property in satisfaction of their liens could not be destroyed by a mere transfer of possession from one party to the contract to the other party thereto. It also follows in reason, we think, that the liens of the execution creditors in the property as they existed when the petition in involuntary bankruptcy was filed could not be subsequently destroyed by the acts of the creditors, the third parties, to the prejudice of the estate, and that if the rights of the bankrupt estate could be lost by the laches of the trustee, the record presents no evidence of such laches. The circumstance that the trustee, in ignorance perhaps of the existence of the conditional sale contracts, first based the right to relief solely upon the claim that an unlawful preference was created through the payment by means of the transfer made by Brown, when insolvent, of an indebtedness to the Plow Company, did not operate to the prejudice of the Plow Company and was plainly insufficient to bar the trustee from asserting an additional right to the relief prayed, viz., the right growing out of the subrogation order made prior to the commencement of the litigation.

Decree affirmed.